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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant,
v.
CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees.

On Appeal from the District Court for the Eastern District of Pennsylvania

BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

LLOYD N. CUTLER
WILLIAM R. PERLIK
LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

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On Appeal from the District Court for the Eastern District of Pennsylvania

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BRIEF OF APPELLANT UNITED STATES RAILWAY ASSOCIATION

This is an appeal from the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain sections of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 45 U.S.C. §§ 701-93 (the "Rail Act" or "Act"). Appellant is the United States Railway Association ("USRA" or the "Association"), a

"government corporation" formed pursuant to Section 201 of the Rail Act.

OPINIONS BELOW

The opinion and concurring opinion in the district court and its order of June 25, 1974, are reprinted in the Joint Appendix ("JA")* at JA 9-83. The opinions are not yet officially reported.

JURISDICTION

These cases were brought pursuant to 28 U.S.C. §§ 1331 (a), 1337, 2201 and 2202, seeking a declaratory judgment that the Rail Act is void for repugnance to the United States Constitution and seeking an injunction against the enforcement, operation and execution of the Rail Act. Three-judge courts were convened pursuant to 28 U.S.C. §§ 2282 and 2284. By consent of the parties, two of the actions originally brought in the District of Columbia were transferred to and consolidated for disposition before the three-judge court in the Eastern District of Pennsylvania.

The order appealed from, declaring certain provisions of the Rail Act null and void as violative of provisions of the Constitution and enjoining Appellant from taking certain actions pursuant to the Rail Act, was entered on June 25, 1974 in all of the cases. No order has been issued respecting a rehearing. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of Pennsylvania on July 17, 1974. JA 386. Appellant's Jurisdictional Statement was filed

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* A Joint Documentary Submission ("J. Doc.") has also been filed with this Court.

on August 23, 1974. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1252 and 1253. See *Shapiro* v. *Thompson*, 394 U.S. 618, 625 (1969); *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-04 (1947).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 3 and 4 of the United States Constitution provide:

> "The Congress shall have Power . . .
>
> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> "To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States, ..."

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, is set forth at JA 391-431.

The Tucker Act, as amended, 28 U.S.C. § 1491, provides in pertinent part:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied con-

tract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

QUESTIONS PRESENTED

1. Whether the court below erred in granting injunctive relief on Plaintiffs' claims that the Rail Act may effect a taking of their property without just compensation, when Plaintiffs have adequate remedies at law including a suit in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

2. Whether the court below breached its duty to construe statutes so as to save their constitutionality when it construed the Rail Act, despite its silence on the subject, as amending the Tucker Act by implication so as to bar any suit in the Court of Claims to recover any difference between the consideration provided in the Rail Act and the "constitutional minimum" expressly recognized in the Rail Act—a construction of the Rail Act which led the court to declare certain provisions of the Rail Act unconstitutional.

3. Whether the court breached its duty to construe statutes so as to save their constitutionality when, after holding that the Rail Act impliedly amended the Tucker Act to bar a remedy for constitutional claims of the rail estates, the court

(a) construed Section 304(f) of the Rail Act to authorize USRA to forbid discontinuance of rail service or abandonment of rail properties even if the "erosion" of the railroad estate should pass the limits beyond which operations can no longer be constitutionally required without compensation—a construction of Section 304(f) which led the court to hold Section 304(f) unconstitutional; and

(b) construed Section 303 of the Rail Act, which expressly requires a "constitutional minimum" consideration for transfers of rail property, to exclude consideration for erosion beyond constitutional limits —a construction of Section 303 which led the court to hold Section 303 unconstitutional.

4. Whether the court below erred in first enjoining all Defendants from taking any action under Section 304(f) to require continuation of rail service that would result in "erosion" beyond constitutional limits and thereafter nullifying other provisions of the Rail Act solely for their failure to provide explicitly for just compensation for the very "erosion" beyond constitutional limits that the court had already enjoined Defendants from causing.

5. Whether, in any event, an injunction unconditionally prohibiting USRA from certifying any Final System Plan for reorganized rail service to a federal court was a necessary or appropriate remedy to prevent the possibility of erosion beyond constitutional limits that the court had already enjoined USRA and all other Defendants from causing.

STATEMENT OF THE CASE

Eight major railroads operating in the Northeast/Midwest region of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. Because of the serious threat that this rail crisis presented to the welfare of the region and of the United States, and because of the inability of the procedures and resources of Section 77 to resolve the underlying problems of these railroads, Congress enacted the Regional Rail Reorganization Act of 1973, which became law on January 2, 1974.

Plaintiffs below are creditors and the sole shareholder of the largest of the railroads now in reorganization, Penn Central Transportation Company ("Penn Central"). They brought these actions seeking declaratory judgments that the entire Rail Act is unconstitutional on its face on a large number of grounds, and further seeking injunctions against the implementation of all of its provisions. JA 161-75. The Trustees of the property of Penn Central Transportation Company, Debtor ("Penn Central Trustees") intervened as Defendants. JA 191. Both sides filed Motions for Summary Judgment. JA 221-25. This appeal is taken from a final judgment granting in part Plaintiffs' Motions for Summary Judgment and denying Defendants' Motions. JA 9-83.

The Rail Act Reorganization Process

The following five steps required by the Rail Act are essential to an understanding of the proceedings below. In the Introduction to the Argument there is a fuller discussion of the statutory provisions intended by Congress to achieve "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region." Section 101(b)(2).

(1) Each United States district court having jurisdiction of a railroad in the region in reorganization under Section 77 ("Reorganization Court") was required to determine within 180 days of enactment whether its railroad should be reorganized pursuant to the Rail Act. Section 207(b). Such determinations (which are described below under the heading "Reorganization Court Proceedings") have been made and are now under review by a special United States district court of three judges ("Special Court") which was authorized by the Rail Act, Section 209(b), and which has been formed in the District of Columbia.

(2) A new government corporation, Appellant USRA, is required to prepare a "Final System Plan" for restructuring the rail properties of the railroads being reorganized pursuant to the Rail Act into a "financially self-sustaining rail service system." Sections 201, 202, 204-06. A central feature of the Final System Plan will be the transfer of designated rail properties to a new, for-profit corporation called Consolidated Rail Corporation ("Conrail") in exchange for all the securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210.

(3) USRA is required to submit a proposed Final System Plan to Congress within 450 days of enactment (*i.e.*, by March 28, 1975). Section 208(a). The Plan becomes "effective" if neither House of Congress disapproves it within sixty continuous session days after submission. Section 208. The Plan is then transmitted by USRA, within 90 days after its effective date, to the Special Court, which has exclusive jurisdiction of all "proceedings with respect to the Final System Plan." Section 209. The Special Court is then directed to order the trustees of each railroad in reorganization to transfer to Conrail all right, title and interest in the rail properties designated in the Final System Plan. Section 303(b).

(4) The Special Court is directed then to determine whether the exchange of rail properties for Conrail securities, USRA obligations and such "other benefits" as the Rail Act provides, is fair and equitable to the estate of each railroad in reorganization. Section 303(c). If the Special Court finds that the transfer is not fair and equitable "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act," the Court is directed to order a reallocation of the Conrail securities, and/or to order

the issuance of additional Conrail securities and USRA obligations (subject to an overall $500 million limitation on USRA obligations used for this purpose), and/or to enter a judgment against Conrail. *Id.* Section 303 does not authorize the Special Court to enter a judgment against the United States. Section 303 does, however, recognize that the consideration to be transferred in exchange for the rail properties must equal the "constitutional minimum" and directs the Special Court to make necessary adjustments so that this "constitutional minimum" is not exceeded. The judgment of the Special Court may be appealed directly to this Court. Section 303(d).

(5) Section 304 of the Rail Act provides that railroads in reorganization subject to the Act may discontinue service over, and may "abandon"—*i.e.*, dispose of as they wish—any rail properties not designated for transfer under the Final System Plan. In the interim, however, Section 304(f) permits a railroad in reorganization to discontinue service on or to abandon lines of railroad only with the consent of USRA.

Reorganization Court Proceedings

Section 207(b) of the Rail Act required each Reorganization Court to decide, in two stages, whether its railroad should be reorganized pursuant to the Rail Act. First, each Reorganization Court was to decide, within 120 days of the Rail Act's enactment, whether (a) its railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and if so whether (b) the public interest would be better served by continuing the reorganization under Section 77 than by proceedings under the Rail Act. If a Reorganization Court made both affirmative findings, it was authorized to keep its railroad out of all subsequent Rail Act proceedings. Railroads not eliminated at the

"120-day" stage went through the second stage, or "180-day" proceeding, in which each Reorganization Court was to order that reorganization proceed under the Rail Act unless it found that the Rail Act "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

On the date of enactment, eight major railroads were in reorganization in the region.[1] In addition, fifteen of Penn Central's railroad subsidiaries ("Secondary Debtors") were considered separately from Penn Central in distinct "120-day" and "180-day" proceedings in the Penn Central Reorganization Court. Hence, the major railroads and the Secondary Debtors required nine determinations by the Reorganization Courts under Section 207(b).

On May 1, 1974, two railroads—the Boston & Maine and the Erie Lackawanna—were kept out of the Rail Act procedures on the "120-day" grounds that they are reorganizable on an income basis under Section 77 and that the public interest would be better served by continuing under Section 77. These determinations have not been appealed. In the remaining seven cases, the railroads were not taken out of the Rail Act at the 120-day stage. In six of these cases, the Reorganization Courts found that the railroads were not reorganizable on an income basis under Section 77. Certain of the Secondary Debtors were found to be reorganizable on an income basis under Section 77 but the Court was unable to conclude that the public interest would be better

[1] They were and are the only operating railroads in reorganization in the United States, except for a tiny carrier, the Cadillac and Lake City Railroad. The Cadillac and Lake City, which is also in the region, has been excluded from further proceedings under the Act on the ground that it is separately reorganizable on an income basis under Section 77 and the public interest would be better served by continuing under Section 77.

served by reorganization under Section 77 than by proceedings under the Rail Act.

These seven cases were therefore the subject of the subsquent "180-day" proceedings in the respective Reorganization Courts. On July 1, 1974, six days after the decision of the three-judge Court below in the present case, two Reorganization Courts, having before them Reading Company and The Ann Arbor Railroad Company, ordered that their reorganizations proceed under the Rail Act. In the remaining five proceedings, which dealt with Penn Central, Secondary Debtors, Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey, and The Lehigh and Hudson River Railway Company, the Reorganization Courts[2] concluded, wholly or in substantial part on the basis of the decision below in the present case, that the Rail Act does not provide a fair and equitable process and declined to order reorganization under the Rail Act.

Section 207(b) provides that appeals from Reorganization Court orders pursuant to that section shall be made to the Special Court. It further provides that there shall be no appeal from the decision of the Special Court. These seven 180-day determinations are all on appeal to the Special Court, which is required by Section 207(b) of the Rail Act to render its decision within 80 days after the appeals were taken, a period which expires on September 29, 1974.[3] Appellant USRA and other parties intend to suggest to the Special Court that it render its decision at that time but stay its mandate pending the determination by this Court of the issues on this appeal.

[2] These five determinations were made by three courts: the Penn Central, Secondary Debtors, and Lehigh Valley reorganizations are all before Judge Fullam in the Eastern District of Pennsylvania. Judge Fullam was also a member of the court below.

[3] In the case of The Central Railroad of New Jersey, the 80-day period expires on September 26, 1974.

Proceedings Below

Plaintiffs in the court below challenged the constitutionality of the Rail Act on a number of grounds. A primary contention was that the consideration provided in the "Final System Plan" for required transfers of rail property pursuant to that Plan will or may, despite the statutory requirement that the consideration be equal to the "constitutional minimum standard of fairness and equity," fall below constitutional requirements so that the transfers will constitute a taking of Plaintiffs' property for less than just compensation in violation of the Fifth Amendment. This contention was rejected by the court below as premature. JA 9 at 23-25.

Plaintiffs also contended below that a taking of their property without just compensation will result from a combination of the allegedly required continuation of rail operations pending implementation of the Final System Plan with the alleged "erosion" beyond constitutional limits of the Penn Central estate during this period. Appellant USRA contended below that, (i) on any theory of "erosion," the record before the court below did not permit a determination of the amount of erosion suffered by any railroad estate or a determination that any railroad estate has reached the "constitutional limit" beyond which operations cannot be required to continue without an adequate remedy at law for compensation; (ii) railroad creditors and owners can constitutionally be required to sustain a reasonable burden of interim erosion while efforts are being made to restructure the railroad on a profitable basis; and (iii) in any event Plaintiffs were not entitled to an injunction or a declaratory judgment of unconstitutionality because, if it should ultimately be determined that the Rail Act had caused an erosion of their interests beyond constitutional limits, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for any claimed shortfall in their compensation.

The court below determined that the present existence of operating losses in the Penn Central system made the erosion issue "ripe for adjudication." JA 9 at 40. The court did not define erosion, nor did it decide whether the Penn Central or any other railroad has yet reached the constitutional limit of erosion, nor did it attempt to define the constitutional limit. The court said only that,

> "we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." *Id.*

Without resolving the factual issues further, the court then turned to the relevant statutory issues. The court apparently read Section 304(f), which requires a railroad in reorganization to obtain the approval of USRA before it discontinues rail service or abandons rail lines during the planning process, as authorizing USRA to withhold approval even if a court has determined that "erosion" has gone beyond constitutional limits and even if an adequate remedy at law for compensation is barred by the Rail Act.

The court then concluded that the Rail Act did bar an adequate remedy at law. It explicitly rejected the contention of Appellant, of the other Government Parties, and of the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for just compensation. JA 9 at 53. The court construed the Rail Act, despite its silence on the subject, as precluding the Court of Claims from taking jurisdiction of any suit for compensation for actions taken under the authority of the Rail Act. The court also apparently decided that the power of the Special Court, pursuant to Section 303,

to determine whether transfers of rail properties are fair and equitable to the estate of each railroad in reorganization and to award the "constitutional minimum," does not include the power to remedy erosion beyond constitutional limits. *Id.* at 53, 82.

Based on this analysis, the court below held Section 304(f)

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad." *Id.* at 82-83.

The court did not define such constitutional rights, but it enjoined all Defendants,

> "from taking any action to enforce the provisions of Section 304(f) . . . with respect to any abandonment, cessation or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." *Id.* at 82.

Technically, this order has effect only if some other court (presumably a Reorganization Court) determines that an abandonment, cessation, or reduction of service is constitutionally required.

The court below went on to declare that Section 303 of the Rail Act, relating to transfers of rail properties pursuant to the Final System Plan, is

> "null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan . . . ." *Id.*

In addition, without explanation, the court enjoined USRA, unconditionally, from certifying *any* Final Sys-

tem Plan to the Special Court pursuant to Section 209 (c). *Id.*

Plaintiffs made a third challenge to the Rail Act on the ground that it is not "uniform" within the meaning of Article I, Section 8, Clause 4, of the Constitution, providing that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The court below rejected this contention except as to one sentence of Section 207(b). *Id.* at 83. That sentence provides that if any Reorganization Court determines, in the "180-day proceedings," that the Act does not provide a fair and equitable process for the reorganization of its debtor and therefore that the debtor shall not be reorganized in accordance with the Act, then the Reorganization Court shall dismiss the Section 77 proceedings. Since the court's ruling nullifying this dismissal requirement does not materially affect the administration of the Rail Act, we do not appeal from this part of the court's order.

SUMMARY OF ARGUMENT

The Rail Act provides varied and substantial new resources to meet a rail crisis that is centered in the Northeast and Midwest but threatens the welfare of the entire nation. These resources can be used to create a self-sustaining rail service system that will meet the needs of the public. The creation of that system will resolve the several present railroad reorganization proceedings and will afford fair and equitable treatment to the creditors and shareholders of the bankrupt railroads.

The Rail Act has been attacked on the ground that under some hypothetical circumstances fairness and equity to these private interests would not be assured. The Act itself, with its commitment of major new public resources, its revamping of the regulatory framework,

and its imaginative adaptation of traditional railroad reorganization procedures and principles, provides ample refutation of the Act's detractors. The short answer to their contentions, however, is that if, despite all of the resources that Congress pledged and all the care it devoted to legislating a constitutional solution to the rail crisis, the Act should require the use or transfer of rail properties for less than the "constitutional minimum" consideration that the Act expressly recognizes to be due, a suit for just compensation in the Court of Claims under the Tucker Act is an adequate and proper remedy at law, and no injunction is justified.

Tucker Act. In the court below, Plaintiffs sought (a) a declaration that the Rail Act is unconstitutional on its face and (b) an injunction against its implementation. Their primary contention was that the Rail Act will cause a "taking" of their "property" for "public use" without "just compensation" in violation of the Fifth Amendment to the Constitution of the United States. The court below should have responded to that challenge by denying the relief sought and dismissing the complaints on the ground that if Plaintiffs should ever wish to present such a claim, they will have an adequate remedy at law in the form of a suit for just compensation in the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491. Decisions of this Court have clearly established that since just compensation remains available in a suit under the Tucker Act, it is inappropriate ever to enjoin duly authorized federal action on the ground that it may constitute a taking for less than the just compensation that must be paid. The same decisions establish that this adequate legal remedy makes it unnecessary and inappropriate for a court of equity, when asked for such an injunction, even to inquire into whether a taking in fact has occurred or will occur.

The court below, however, ruled that the Rail Act bars a Tucker Act remedy for claims arising under the Rail Act. The court assumed that the existence of such a remedy depends on the intention of Congress, when it passed the Rail Act, to make a Tucker Act remedy available. Hence, the court stated the question as whether there was an "implied remedy at law," JA 9 at 41, and concluded that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." *Id.* at 53.

In fact, the Tucker Act stands by itself as a century-old bulwark both against inadequately compensated takings of property and against unwarranted prior restraint by courts of equity against the efforts of Congress to provide for the needs of the nation. The Tucker Act, by itself, confers jurisdiction on the Court of Claims to hear money claims arising under the Constitution of the United States, including claims for just compensation for the public use of private property. This remedy is available for any claim of taking (including claim of a taking of the *use* of property) that results from authorized federal action. It is not necessary, when Congress passes later substantive legislation which someone alleges to have caused a taking, that Congress have intended a taking, or have provided a remedy, or have explicitly or implicitly preserved the availability of the Tucker Act remedy in the later legislation.

The only question properly before the court below on this issue was whether the Rail Act repealed the jurisdiction of the Court of Claims *pro tanto* as to affected rail estates. This it clearly did not do. The Rail Act nowhere mentions either the Tucker Act or the Court of Claims, although it contains thirteen separate provisions explicitly modifying or repealing other federal statutes, including an entire section entitled "Relationship to Other Laws." While it is clear from the statute and its legislative history that Congress did not expect that the consideration provided under the Rail Act would be judicially determined to be less than the "constitutional minimum" that the Rail Act expressly recognizes to be due, there is nothing in the Rail Act or its legislative history to suggest that Congress intended to deny the traditional Court of Claims remedy to anyone asserting such a claim.

The questionable inference, drawn by the court below, that the Rail Act implicitly repealed a basic grant of jurisdiction to a federal court, was especially inappropriate in light of its consequences: (a) to impute to Congress a deliberate intention to act in an unconstitutional manner by requiring transfers of rail property for consideration that might judicially be determined to be less than the "constitutional minimum" Congress itself recognized and by barring any remedy to recover the shortfall, and (b) to strike down portions of a major federal statute that the Court apparently would have upheld if it had drawn the opposite inference. The action of the court below thus violated the basic precept of constitutional litigation that a statute shall be interpreted, where possible, so as to save rather than destroy its constitutionality.

Section 304(f). Apart from its rejection of the Tucker Act remedy, the district court's resolution of the merits of the "taking" allegations was also erroneous. One of Plaintiffs' allegations was that Section 304(f) of the Rail Act, which forbids railroads in reorganization from discontinuing service or abandoning rail lines during the rail planning process without the approval of USRA, has caused and/or will cause a "taking" of Plaintiffs' property in the form of "erosion" of railroad estates through continued rail operations. The court below did not decide whether "erosion" amounting to a "taking" has occurred or will occur. Indeed, the court neither de-

fined "erosion" nor specified the constitutional limits beyond which erosion becomes a taking and cannot be compelled unless an adequate remedy for just compensation is available. Instead, the court took the following extraordinary steps: (a) it decided that the constitutionality of Section 304(f) was ripe for adjudication even though the constitutional limit of erosion had not been found to have been reached and might not ever be reached; (b) it interpreted Section 304(f) as barring discontinuances and abandonments even though the result would be erosion beyond constitutional limits for which the court had ruled no adequate remedy was available; (c) it declared Section 304(f), as so construed, unconstitutional as applied to these hypothetical circumstances; (d) it enjoined USRA, now, from interfering with any discontinuance or abandonment that another court may hypothetically find constitutionally required; and (e) finally, it declared other portions of the statute unconstitutional, without explanation, because they do not specifically provide a remedy for the very erosion beyond constitutional limits that the court itself had already done more than necessary to prevent.

The court, based on its ruling that the Rail Act barred an adequate remedy at law, declared Section 304(f) "null and void as violative of the Fifth Amendment . . . to the extent that it would require continued operation of rail serivces at a loss in violation of the constitutional rights of the owners and creditors of a railroad." JA 9 at 82-83. The court then enjoined the Defendants

> "from taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect of any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." *Id* at 82.

If this were all the court below had done, its order would be merely gratuitous. The court did not need to interpret Section 304(f) as permitting USRA to ignore such constitutional rights as a later court may declare. It did not need to strike down the section, or to enjoin USRA, now, from violating constitutional rights declared by a hypothetical later court. Even if the court correctly construed the Rail Act as denying an adequate remedy at law, the entire resulting problem could have been resolved by interpreting Section 304(f) as conferring authority only within the bounds permitted by the Constitution. If, as the court below hypothesized, some later court finds that an abandonment, cessation or reduction of railroad service is required to preserve constitutional rights, there is no reason to assume now that USRA will act in violation of that hypothetical determination or that the later court would not be able itself to issue such injunctive and other orders as may be necessary to enforce the constitutional rights it has declared.

Section 303. The court below did not stop at enjoining action under Section 304(f). It also declared that Section 303 of the Rail Act, which provides for the conveyance of rail properties to Conrail pursuant to the Final System Plan and for the valuation of those properties and the consideration therefor

> "is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute." JA 9 at 82.

This ruling, holding void a section of the statute that is not even discussed (save for incidental references) in the court's opinion, was wholly unnecessary and erroneous even on the court's view of the Tucker Act and erosion issues. In the first place, the court below did not de-

termine that an erosion taking, requiring just compensation, either has occurred or would occur if the process of the Act were allowed to go forward unimpeded. Consequently, even on the court's view of the facts, the erosion question may never arise.

More important, by its treatment of Section 304(f), the court below itself eliminated any possible objection to Section 303. The court enjoined all Defendants from taking action under Section 304(f) that would conflict with any future judicial determination that service should be discontinued or property abandoned in order to avoid erosion beyond constitutional limits. In fact, no Reorganization Court or other court has yet determined that the constitutional limit has been reached in the case of its railroad. If any Reorganization Court or other federal court determines that the constitutional limit has been reached, it will presumably order selective or total discontinuance of rail service or abandonments of rail lines. As noted above, (a) once the court below held that the Rail Act bars an adequate remedy at law, it should not have interpreted Section 304(f) of the Rail Act to purport to give USRA authority to prevent discontinuances or abandonments in such circumstances, (b) the Reorganization Court or other federal court making such determination would obviously have power, should it for some reason be necessary, to enjoin USRA from interfering with its orders issued on constitutional grounds, and (c) in any event, the court below itself enjoined USRA from interfering with such hypothetical future constitutionally required discontinuances or abandonments. Consequently, if there was ever any possibility that the Act would cause any railroad estate to reach the constitutional limit of erosion and yet require such railroad to continue to operate beyond that point, this defect has been anticipatorily remedied by the court below. There was no need to declare Section 303 unconstitutional for failing to provide just compensation for

an erosion taking caused by the Rail Act when the possibility of any such taking has been more than adequately eliminated.

Certification of the Final System Plan. The court below did not stop even with this second ruling. It went on to enjoin USRA from certifying *any* Final System Plan to the Special Court. There is not a single sentence in the opinions below that offers an explanation for this ruling prohibiting the central step contemplated by the Act. On the district court's own analysis, the constitutional limit of erosion may never be reached. If it is reached, it may be possible for the affected railroad, USRA, and others including Congress and the Special Court to devise a basis for continuing rail service subject to adequate compensation in the Final System Plan or otherwise. If that is not possible, the Reorganization Court (or another appropriate court) can order discontinuance or abandonment, as necessary, on constitutional grounds. If it be presumed that USRA would disregard any such order, USRA has now been enjoined from doing so. In no imaginable set of circumstances, however, could the certification of a Final System Plan by USRA to the Special Court be an unconstitutional step; nor could an injunction against this step serve in any way to remedy any defect in the Rail Act found by the court below.

Calculation of Erosion. Calculation of erosion requires a comparison between the consequences to creditors and shareholders of reorganization under the Rail Act with the consequences of some other alternative now available. The record in this case does not permit a determination of the consequences of a long and expensive liquidation proceeding commenced now, or of any other available alternative. Nothing in the record demonstrates that proceedings under the Rail Act, including the preservation of going-concern values in a railroad system suited

to the present economic environment, the ability to obtain state, local and private support for important but unprofitable rail services, the abandonment and transfer of unprofitable lines in a prompt and orderly manner, federal assumption of labor protection costs, substantial direct and indirect cash subsidies and the use of federally guaranteed debt, will yield creditors and shareholders less than they can receive from any available alternative.

Moreover, the *Rock Island*,[4] *Denver & Rio Grande*,[5] *Penn-Central Merger*[6] and *New Haven Inclusion*[7] cases make it clear that even if it could be shown that interim operations will lead to a less satisfactory result for claimants than some alternative available now, a reasonable burden of "erosion" may constitutionally be imposed while efforts are made to restructure their railroads into a viable going concern. The "property" of railroad creditors and owners is inherently subject to the right of the public to make reasonable efforts to preserve essential rail operations on a self-sustaining basis. There is no reason to assume, at this time, that the implementation of this major federal program in accordance with the very tight time schedule provided in the Act itself will subject creditors or shareholders to an unconstitutional erosion of their property.

[4] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

[5] *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946).

[6] *Penn-Central Merger Cases*, 389 U.S. 486 (1968).

[7] *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

ARGUMENT

Introduction: The Rail Crisis and the Rail Act

Eight major railroads[8] operating in the Northeast/Midwest Region[9] of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. The resulting threat to the welfare of the Region and of the United States,[10]

[8] Seven are Class I railroads: the Penn Central, Reading, Erie Lackawanna, Central of New Jersey, Lehigh Valley, Boston & Maine, and Ann Arbor. Of these, the Erie Lackawanna and Boston & Maine were found by their Reorganization Courts to be separately reorganizable under Section 77, and consequently will not be reorganized under the Rail Act. A Class I railroad is defined by the Interstate Commerce Commission ("ICC") as a railroad with $5 million or more of annual revenue. ICC Finance Dockets show these seven to be the only Class I railroads in the nation in reorganization.

In addition to these Class I railroads, one significant Class II railroad, the Lehigh & Hudson River, is in reorganization in the Region. As noted above, a second, tiny Class II railroad, the Cadillac and Lake City, is also in reorganization in the Region but has been found to be separately reorganizable and will not be reorganized under the Rail Act. See p. 9 note 1 *supra*. The ICC Finance Dockets disclose that the only Class II railroad in reorganization outside the Region ceased all operations in 1968 and sold substantially all of its lines in 1969.

[9] The Act defines "Region" as "the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, and Illinois; the District of Columbia; and those portions of contiguous States in which are located rail properties owned or operated by railroads doing business primarily in the aforementioned jurisdictions (as determined by the [ICC] by order)." Section 102(13). ICC Order, *Ex Parte No. 293*, approved January 14, 1974, delineated areas near Louisville, Kentucky; St. Louis, Missouri; and Kewaunee and Manitowoc, Wisconsin, as included in the Region. As used herein, the term "Region" refers to the area defined in the statute and by the ICC.

[10] A 1970 Department of Transportation study concluded that within eight weeks of a complete shutdown of the Penn Central, GNP for the nation would drop by 2.7% and for the Northeast by 5.2%. Nearly two million Penn Central and other affected employees would be laid off. Statement of Secretary Brinegar in Hearings be-

coupled with the inadequacy of the procedures and resources of Section 77 to resolve it, led Congress to enact the Rail Act.

A. The Rail Act Is Designed To Provide New Solutions to New Problems that Created the Rail Crisis

The present rail crisis resulted from a number of problems that Section 77 is inadequate to correct. The number of railroads in reorganization, their concentration in a single region, and the vast extent of their operations make it clear that there is a crisis. The fact that the railroads' problems in the 1970's are not primarily problems of capital structure but arise from shifting economic trends and are in part the result of regulatory policies[11] make the limited resources of Section 77 inadequate. The Rail Act reflects Congress' recognition that some of the problems can be solved only by providing new financial and legal resources and new procedures for resolving regulatory issues. The Act also modifies existing Section 77 procedures to permit

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fore the Surface Transportation Subcomm. of the Senate Comm. on Commerce, Ser. 93-8, pt. 2, at 258 (May 30, 1973).

The area served by the Penn Central included, in 1970, 55% of the nation's manufacturing plants and 60% of its employees engaged in manufacturing. Congress was well aware of the problems that would be caused by the shutdown of a railroad carrying about 1 million tons of freight every day, carrying over its lines about 21% of all freight cars loaded in the United States, and serving exclusively 59 defense facilities. Special Staff of Senate Comm. on Commerce, 92d Cong., 2d Sess., *The Penn Central and Other Railroads, A Report to the Senate Committee on Commerce* XIX (Comm. Print 1972).

[11] See S. Rep. No. 93-601, 93d Cong., 1st Sess. ("Senate Report") 6-7 (1973). As the House Committee stated, Section 77, which "contemplates a program of restructuring capital" in response to the fact that "depression-spawned railroad bankruptcies were the product primarily of over capitalization," is not "responsive to the urgent problems confronting the railroads in the northeast today" where "insolvency is much more complex." H.R. Rep. No. 93-620, 93d Cong., 1st Sess. ("House Report") 29 (1973).

reorganization of several railroads into a single consolidated unit.

1. *The Rail Act Provides a Thorough Planning and Review Process*

In general, the Rail Act provides for the following steps to plan a restructured rail system created out of selected rail properties of railroads now in reorganization, and to review the "fairness and equity" of the Plan.

(a) USRA, with the assistance of the Secretary of Transportation ("Secretary") and the Rail Services Planning Office ("RSPO"), a new office created by the Rail Act within the ICC is to prepare a Final System Plan for restructuring the operations of the railroads in reorganization.[12] A central feature of the Final System Plan will be the transfer of designated rail properties of railroads in reorganization to Conrail, a private corporation for profit to be created, pursuant to Section 301, to own and operate the restructured system. The Final System Plan will provide for the issuance to the transferor estates of securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210. It may also provide for transfer to and consideration from profitable railroads, Section 206(c)(1)(b) and 206(d)(2),[13] and may provide for additional Government obligations, subject to approval by joint resolution of Congress. Sections 206(h), (i), and 210(b).

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[12] Sections 202, 204, 205, and 206. The statutory deadlines in Sections 204 and 205(d)(1) for preliminary reports by the Secretary and RSPO have been met.

[13] These transfers are subject to expedited review by USRA and the ICC, whose rulings are not reviewable by any court. Section 206(d)(3).

(b) Following publication of and hearings on a preliminary system plan, USRA must submit a proposed Final System Plan to the ICC and Congress within 450 days after enactment (*i.e.*, by March 28, 1975). Sections 207(c), 208(a). The Plan becomes effective if neither house of Congress disapproves it within 60 continuous session days. Section 208. Within 90 days after it becomes effective, the Final System Plan is to be transmitted to the Special Court created pursuant to Section 209 of the Rail Act. Section 209(c). The Conrail securities and USRA obligations designated in the Final System Plan as consideration for rail properties to be transferred to Conrail under the Plan, and the consideration from any profitable railroad purchasing property, must be delivered to the Special Court within ten days after the Plan is transmitted. Section 303(a). Within a further ten days, the Special Court is to order the transfer of the rail properties designated in the Plan. Section 303(b).

(c) The Special Court is then to determine whether the exchange of rail properties for securities and "other benefits" is fair and equitable to the estate of each railroad in reorganization "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankruptcy Act." Section 303(c)(1)(A). Congress recognized that, for the exchange to be "fair and equitable," the value of the consideration for the transferred properties had to equal the "constitutional minimum," and directed the Special Court to make any adjustment needed so as not to exceed this "constitutional minimum." Sections 303(c)(1)(B), (c)(3). The Special Court is required, if it finds that the exchange is not fair and equitable, to order a reallocation of the Conrail securities, and/or to order the issuance of additional Conrail securities or USRA obligations, and/or to enter a judgment against Conrail. Section 303(c)(2). A finding, determination, order, or judgment of the Special

Court under Section 303 may be appealed directly to this Court. Section 303(d).

2. *The Rail Act Provides Resources Not Available in Section 77 Reorganizations*

Section 77 was designed primarily to provide a procedure for the recapitalization of a single railroad. It does not provide any means of trimming rail operations to meet changed economic and competitive conditions, or any means of compensating employees whom the railroads are obligated to employ but who are unneeded in a slimmer system. It does not provide any government financial assistance. It does not provide any specific means of transferring rail properties either to other railroads (which might put them to more profitable rail use) or to governments or other entities for rail or non-rail use. Finally, it provides no means of coordinating the reorganizations of two or more railroads in the same area.

The Rail Act was designed in part to supplement Section 77 in these respects. The center of the Rail Act is its provision for a planning process leading to a restructuring of rail operations and the abandonment of excessive facilities.[14] At the same time, the Act includes special features, funded by up to $250 million of authorized federal appropriations, to protect employees who might be adversely affected. Title V.

Four additional forms of financial support provided by the Rail Act deserve special mention:

(a) USRA is authorized to issue $1.5 billion in Government-guaranteed obligations. Of this sum, up to $1 billion may be issued to Conrail, of which not less than

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[14] The differing Senate and House approaches and their resolution are described in the Conference Report, H.R. Rep. No. 93-744, 93d Cong., 1st Sess. ("Conference Report") 61-63 (1973).

half must be used by Conrail for rail rehabilitation and modernization. Section 210(b). Additional amounts above this revolving $1.5 billion ceiling may be issued if approved by joint resolution of Congress. *Id.* The Act permits Conrail's obligations to USRA to be on terms different from the terms of USRA's government-guaranteed obligations. Thus, $1 billion in financing can be made available to Conrail on terms more favorable than are ordinarily available in the commercial market.

(b) The Secretary, with USRA's approval, is authorized to enter into agreements (involving the issuance of up to $150 million in USRA obligations) for the acquisition, maintenance, or improvement of property that will be included in the Final System Plan. Section 215.

(c) To meet emergency needs pending implementation of the Final System Plan, the Secretary is further authorized to make payments not exceeding $85 million to the trustees of railroads in reorganization. Section 213.[15]

(d) The Secretary and USRA may provide to public agencies (within a $180 million authorization) subsidies for continuing non-economic service and loans for the acquisition and modernization of rail properties. Since these funds are to be made available on a 70-30 matching basis, the assistance under these programs is actually approximately $250 million.

To overcome the difficulty of severing and transferring properties in the traditional Section 77 process,[16] Con-

[15] The court below stated, JA 9 at 32, that only $35 million of this amount had been appropriated. The current total is $74,800,000. See Foreign Assistance and Related Programs Appropriations Act of 1974, Pub. L. 93-240 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, Pub. L. 93-305 (June 8, 1974) ($39.8 million).

[16] See Interstate Commerce Act § 5, 49 U.S.C. § 5; *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954).

gress provided that the Final System Plan could require rail properties of the railroads in reorganization to be sold for their fair value pursuant to the Final System Plan to (i) profitable railroads in the Region, (ii) the National Railroad Passenger Corporation ("Amtrak") for rail passenger service, (iii) state, regional, or local transportation authorities for commuter and intercity rail services, and (iv) various recipients for other public purposes, including highways, conservation, education, and recreation.[17] As already mentioned, railroads in reorganization will also be able, subject to USRA's approval, to dispose of unneeded rail properties for the best price under simplified abandonment and termination procedures.[18] The Act also provides for the possibility that Congress will authorize USRA to guarantee Conrail obligations, Section 206(i), or to issue obligations in excess of the $1.5 billion limit in order to implement the Final System Plan, Sections 206(h) and 210(b).

Finally, the Rail Act reflects Congress' recognition of the need to coordinate the reorganization of adjoining and competing railroads in reorganization: "[N]o one Court can restructure the entire system under Section 77."[19] Congress therefore created a new agency—USRA—to formulate "essentially a railroad reorganization plan which would consolidate parts of [the] bankrupt carriers into a new for-profit carrier,"[20] and, to review and approve the Plan, it created a single new court—the Special Court—with all the powers of a Section 77 court.[21]

[17] Section 206(c).

[18] Section 304.

[19] House Report at 29.

[20] *Id.* at 23-24.

[21] Section 209(b).

B. The Rail Act Provides Solutions to the Problems that Have Made It Impossible To Reorganize the Penn Central Under Section 77 [22]

All Plaintiffs in this case have claims against the Penn Central estate, and the Penn Central Trustees have intervened as Defendants. Consequently, although Plaintiffs challenged the Rail Act as unconstitutional on its face, the Penn Central reorganization proceeding provides an essential backdrop against which their contentions must be evaluated.

The Penn Central entered reorganization under Section 77 on June 21, 1970. During the first 30 months of reorganization, the Penn Central Trustees identified and attempted to satisfy four conditions which they judged necessary to a successful Section 77 reorganization:

(1) rationalization of the physical plant by eliminating excess capacity;

(2) elimination of unnecessary labor expense;

(3) full compensation for all passenger service; and

(4) increased freight traffic and revenues.[23]

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[22] Since the primary focus of the Act was on the Penn Central, this and the following section of this Brief present examples of how and why Congress thought the Rail Act was a reasonable approach to the Northeast/Midwest problem. Although the examples are drawn specifically from the Penn Central reorganization proceeding, it is clear that Congress considered many of the Penn Central's problems to be shared by other Northeast/Midwest railroads. See Senate Report at 6-14; House Report at 25-29.

[23] The first three conditions were identified in the Preliminary Report of Trustees Concerning Premises for a Reorganization (February 10, 1971), J. Doc. 1 at 3. As for the fourth condition, a September 1971 report concluded that a study of Penn Central's revenue-producing potential was necessary. Second Report of Trustees on Status of Reorganization Planning (September 17, 1971) ("September 1971 Report"), J. Doc. 3 at 14-18. In February 1972 the Trustees reported that a successful reorganization required, *inter alia*, attaining a certain projected volume of freight traffic and revenue increases. Report of Trustees on Reorganization Planning (February 15, 1972) ("February 1972 Report"), J. Doc. 4 at 1.

These four conditions were made especially explicit in the Penn Central Trustees' Plan for Reorganization (April 1, 1972) ("April 1972 Reorganization Plan"), J. Doc. 5 at 1, and were reiterated in, *e.g.*, Trustees' Interim Report of October 1, 1972 ("October 1972 Report"), J. Doc. 7 at 1; Trustees' Interim Report of January 1, 1973 ("January 1973 Report"), J. Doc. 8 at 1; and Trustees' Report on Reorganization Planning (April 3, 1974) ("April 1974 Report"), J. Doc. 10 at 4.

[24] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 1.

[25] Penn Central Trustees' Interim Report of February 1, 1973 ("February 1973 Report"), J. Doc. 9 at 2.

[26] Pub. L. 93-5, 87 Stat. 5. The Secretary satisfied this requirement with *Northeastern Railroad Problem, A Report to the Congress*, submitted to Congress on March 26, 1973 ("*Northeastern Railroad Problem*").

[27] On April 16 and 17, May 8, 9, 10, 21, 30, and 31, and June 6 and 7, 1973, the House Committee on Interstate and Foreign Commerce held hearings on H.R. 6591, H.R. 4897, H.R. 5822, H.R. 5385, H.R. 6880, H.R. 7373, and H.J. Res. 50. On February 28, March 2, May 30 and 31, and June 4, 15, 21, and 22, 1973, the Senate Committee on Commerce held hearings on S. 1031, and, on November 15, 16, and 19, 1973, it held hearings on S. 2188 and H.R. 9142. Out of these hearings evolved the 1973 Act. The House and Senate Reports are dated November 3 and December 6, 1973, respectively.

The Penn Central Trustees reported for the first time on January 1, 1973, that they believed substantial government financial assistance was essential in order to achieve service improvements that would attract the necessary increases in freight traffic and revenues.[24] Seven days after the Penn Central Trustees' February 1973 Report quantified this needed assistance at $600-$800 million,[25] Congress passed Joint Resolution 59 directing the Secretary to submit within 45 days "a full and comprehensive plan for the preservation of essential rail transportation services in the Northeast . . . ."[26] After studying various measures to relieve the rail crisis during the remainder of 1973, Congress approved the Rail Act.[27]

On May 2, 1974, the Penn Central Reorganization Court found in the 120-day proceedings provided for in the first sentence of Section 207(b) of the Rail Act that the Penn Central is "not reorganizable on an income basis within a reasonable time under § 77 of the Bankruptcy Act . . . ."[28] The Reorganization Court described the Penn Central's situation in part as follows:

> ". . . I am persuaded that reorganizability must be determined on the assumption that the existing regulatory and operational setting will continue. From the very inception of these proceedings, it has been reasonably clear that, if certain conditions could be altered, the Debtor could be made viable. The needed changes—elimination of plant redundancy, reductions in crew consists, full reimbursement for passenger service, improvement in rates and divisions, and, more recently, substantial governmental financial assistance—are not within the control of the Trustees or this Court, and have not been realized." JA 84 at 88.

The accomplishment of the very task the Penn Central Reorganization Court found impossible under Section 77 —the creation of a viable system—is described in the Rail Act as the first goal of the Final System Plan. Section 206(a)(1). To achieve this goal, the Act provides the resources and mechanisms—unavailable in Section 77—that are necessary.

1. *Elimination of Excess Capacity*

The Penn Central Trustees,[29] the Department of Transportation,[30] the Penn Central Reorganization Court,[31] and Congress[32] have all recognized that the Northeast railroads, and the Penn Central in particular, are burdened by an excessive physical plant. By January 1, 1973, the Trustees had filed applications with the ICC to abandon over 3,000 miles of lines which they deemed to be uneconomic, of which the ICC had approved less than 800 miles.[33] By then the Trustees had concluded that at this rate the reduction needed to produce net income by 1976 could not be achieved. The problem of plant redundancy also includes the operation of duplicative facilities by two railroads in an area that can support only one, a problem that the Rail Act can ameliorate but Section 77 cannot.[34]

The Act offers a process of streamlining and restructuring that simply was not available to the Reorganiza-

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and the Conference Report is dated (in the House) December 20 and (in the Senate) December 26, 1973. Enactment occurred on January 2, 1974.

[28] *In re Penn Central Transp. Co.*, Bky. No. 70-347, Memorandum and Order No. 1543 (E.D. Pa., May 2, 1974), JA 84 at 102.

[29] The Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2, proposed "(i) taking advantage of the potential for increased efficiency made possible in theory by the 1968 merger but never realized in fact, (ii) abandonment of those freight lines which have neither busines nor public service justification, and (iii) making appropriate arrangements for continuing those freight lines found to be essential to the public service but inoperable on a sound business basis." See also Trustees' January 1973 Report, J. Doc. 8; Trustees' April 1974 Report, J. Doc. 10.

[30] See *Northeastern Railroad Problem*, *supra* at 6. Congress obviously accepted the premise, which creditors now ask this Court to reject, that "if permitted to emerge unencumbered from the tangled web that now embraces these carriers, a new entity (or entities) would generate sufficient profits and be able to raise sufficient cash to finance operations and expansions." *Id.* See also the Secretary's Section 204 report, *Rail Service in the Midwest and Northeast Region*, February 1, 1974 (*"Secretary's Rail Service Report"*).

[31] Memorandum and Order No. 1543, *supra*, JA 84 at 88.

[32] House Report at 27.

[33] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 3.

[34] *Secretary's Rail Service Report*, *supra* at 3, concludes that 96% of the 1972 freight carloads carried on the railroads in reorganization could have been accommodated on 75% of the 1972 route mileage.

tion Courts. In general, Section 77 makes no provision for restructuring rail operations, and discontinuance of service and abandonment of property could be accomplished only on a line-by-line basis following standard ICC procedures. The Act turns the process around by permitting USRA to select the services and properties that are to be kept in operation, with essentially automatic discontinuance and abandonment of everything else. That process goes far to explain why there is a reasonable prospect of creating a viable Conrail under the Act even though the Penn Central and other railroads now in reorganization cannot be made viable in Section 77 proceedings.

(a) *Abandonments* have been difficult, and have not been accomplished with sufficient speed, because of the need to comply with ICC and National Environmental Policy Act procedures.[35] The Act dispenses with the need for both, and permits USRA—in the absence of reasonable objection from affected state or local governments—to authorize prompt interim abandonments. Sections 304 (f) and 601(c).

A core system could not be established by the Penn Central Reorganization Court because it has no authority

[35] See *Harlem Valley Transp. Ass'n* v. *Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), aff'd, No. 73-2496 (2d Cir., June 18, 1974). Between the district court's decision in that case in July 1973 and the court of appeals' affirmance in June 1974, there was a *de facto* moratorium on almost all abandonment applications pending before the ICC.

The economic burden imposed on railroads by lengthy abandonment procedures is emphasized in House Report at 27 and 55 and in the debates at 119 Cong. Rec. S22,483 (daily ed. Dec. 11, 1973) (remarks of Senator Hartke) and 119 Cong. Rec. S23,782-83 (daily ed. Dec. 21, 1973) (remarks of Senator Hartke). In addition, the advantageous procedures for abandonments contained in the Act were stressed by the President when he signed the bill into law. 10 Presidential Documents: Richard Nixon 8 (Jan. 2, 1974).

to order the restructuring of the debtor's rail operations.[36] Even a final reorganization plan under Section 77 would be dependent on piecemeal abandonments, each subject to ICC approval.[37] The Act, on the contrary, permits the selection of properties that have going-concern value and permits the prompt discontinuance of service, without ICC action, on all lines and properties not so selected.[38]

(b) *Excessive duplication of plant and service* among competing carriers could not be effectively dealt with by the Section 77 reorganization process because of the difficulty of negotiations between carriers that are in reorganization,[39] the need for ICC approval of mergers and consolidations [40] and the ICC's lack of authority under Section 77 to authorize mergers not initiated by the debtor,[41] antitrust law considerations, and, of course,

[36] Section 77 makes no provision for a comprehensive restructuring of rail operations as part of the reorganization process. Discontinuance of service and abandonment of lines can be accomplished, during Section 77 proceedings, only by ICC proceedings on a line-by-line basis. For example, abandonments that would require the closing of some line segments which, viewed individually, appear viable, but whose continuation reduces the carrier's overall earnings from what they could be if the carrier were allowed to concentrate its traffic on fewer routes may not be possible within present ICC regulatory guidelines. Spychalski, *Imperfections in Railway Line Abandonment Regulation and Suggestions for their Correction*, 40 ICC Prac. J. 454, 456-57 (1973). No such constraints limit the broad power of USRA to exclude rail lines from the Conrail system.

[37] See *Penn Central Transportation Co. Reorganization*, Corp. Reorg. Rep. (Penn Central), Document No. 95, at 1102:86, 104 (ICC Finance Docket No. 26241, Sept. 28, 1973).

[38] Sections 304(a) and 601(b). Operations may be continued on a fully subsidized basis. See Section 304(c).

[39] See House Report at 29.

[40] Interstate Commerce Act § 5, 49 U.S.C. § 5.

[41] See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298 (1954). That case states "that those who in the absence of § 77 would wield the corporate merger powers must initiate and work

each reorganization court's lack of jurisdiction over other carriers in reorganizations under the supervision of other judges. The Act offers an entirely different framework. USRA will have final control, subject only to review by Congress, over the design of the intramodal environment in which Conrail will compete.[42] USRA can encourage competition where traffic can support it, but USRA can control competition among carriers in reorganization and duplication of facilities where necessary to produce a viable system.

(c) ***Transfer of the burden of uneconomic but significant lines to the states, localities, and private interests affected was difficult under Section 77 but becomes possible under the Act.*** The Penn Central Trustees, as early as February 15, 1972, expressed the hope that lines that were producing losses for the Penn Central but were asserted to be important to particular localities and shippers could be continued, under contracts with those localities and shippers that would make Penn Central whole.[43] Penn Central, however, had little bargaining leverage because the alternative of selective discontinuance of service was a very remote possibility. The Department of Transportation's proposals for the Northeast rail problem included the suggestion that "states and local communities will be given the opportunity to ensure the continuation of rail service if they find it necessary and are willing to subsidize the deficits *fully*." [44] Under Section 304 of the Act, service on lines not included in the Final System Plan may be terminated promptly unless the service is fully subsidized or the lines are purchased and operations are provided for by the purchaser.[45]

out the merger now." *Id.* at 309 n. 12. "The implication is plain: the officers and directors of the Debtor are the ones entitled to initiate and work out a merger." *In re Florida East Coast Ry.*, 137 F. Supp. 693, 694 (S.D. Fla.), aff'd per curiam, 227 F.2d 518 (5th Cir. 1955).

[42] See Sections 207 and 208.

[43] Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2. See also Trustees' February 1973 Report, J. Doc. 9 at 1.

[44] *Northeastern Railroad Problem, supra* at 48 (emphasis added).

2. *Elimination of Unnecessary Labor Expense*

The Penn Central Trustees and the Reorganization Court identified elimination of excess labor costs for railway operating personnel as another requirement for a successful reorganization.[46] This problem involves both crew size on operating lines and labor protection in connection with necessary abandonments.[47] Title V of the Rail Act offers labor protection in connection with necessary abandonments, and authorizes $250 million of federal assistance to pay the cost of this protection. Section 509.

3. *Elimination of Uncompensated Passenger Service*

The third condition for a successful reorganization of the Penn Central is the elimination of the burden of passenger service for which the railroad is not fully compensated.[48]

One of the major issues in litigation between the Penn Central and Amtrak has been whether Penn Central should receive a return on investment as part of its compensation for the use by Amtrak of its rail prop-

[45] See Section 304(a)-(d).

[46] *E.g.*, Memorandum and Order No. 1543, *supra*, JA 84 at 88; Penn Central Trustees' February 1972 Report, J. Doc. 4 at 2; Trustees' April 1972 Reorganization Plan, J. Doc. 5 at 1; Trustees' January 1973 Report, J. Doc. 8 at 3.

[47] See, *e.g.*, *Penn Central Transportation Co. Reorganization, supra*, Corp. Reorg. Rep. (Penn Central) at 1102:104-06; Penn Central Trustees' January 1973 Report, J. Doc. 8 at 3; Trustees' October 1972 Report, J. Doc. 7 at 3-4.

[48] See, *e.g.*, Memorandum and Order No. 1543, *supra*, JA 84 at 88; Penn Central Trustees' February 1972 Report, J. Doc. 4 at 5.

erties in the Boston-Washington corridor. The Rail Act provides for the sale or lease to Amtrak of those rail properties. Sections 206(c)(1)(C), 601(d).[49]

As pointed out above, the Act further provides for a system of subsidies, involving matching federal grants authorized at $180 million for two years to state, local, or regional authorities, to ensure the continuation of rail services, including passenger services. Sections 401 and 402. This USRA authority should enhance the prospects that other governmental entities will subsidize uneconomic commuter passenger operations. Also, USRA can make loans to state, local, or regional transportation authorities to acquire rail properties and to modernize their properties. Section 403.

4. *Increased Revenues Through Application of New Financing*

The Penn Central Trustees have noted that the Penn Central has been caught in "a vicious circle." [50] In order to become viable it needed to increase the volume and efficiency of freight traffic and operations, but inadequate revenues and lack of borrowing capacity made unattainable the necessary substantial additions and improvements to the physical plant as well as substantial catch-up maintenance.

The Act offers a means by which Conrail can break the circle. Section 210 provides, in effect, $1 billion in federally guaranteed obligations of USRA to enable Conrail to borrow funds on the favorable interest and payment terms enjoyed by the United States. Half of this sum must be used to rehabilitate and modernize the physical plant, and USRA may make available the remaining half, if necessary, for that purpose.[51]

[49] The method of compensation for services provided to Amtrak is covered by the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. §§ 501 *et seq.*

[50] Penn Central Trustees' January 1973 Report, J. Doc. 8 at 2. See also Trustees' April 1974 Report, J. Doc. 10 at 3.

The Act, clearly, is broadly responsive, and in many ways more than responsive, to the concerns expressed by the Penn Central Trustees when they first outlined their views on the necessary government financial assistance.[52] They themselves, of course, have acknowledged the soundness and responsiveness of the Act as it relates to the creation of a self-sustaining rail service system:

> "The basic concept of the Act is, in the Trustees' judgment, sound. The Act envisions the transfer to a new entity (Consolidated Rail Corporation, CRC) of those Penn Central lines, and lines of other bankrupt carriers, which, following a thorough planning process, are found to offer the prospect of a viable rail network in the Northeast. Provision is made for public support or abandonment of those lines not deemed essential in the restructuring process. Provision is also made for government-guaranteed financing of improvements to the plant being conveyed to CRC. The Act embodies a labor protection arrangement, satisfactory to both labor and industry, whereby Federal funding is available to certain employees whose services would not be required after the restructuring." [53]

[51] In the interim period before implementation of the Final System Plan, USRA is authorized to issue up to $150 million in obligations to finance agreements with the Penn Central and other railroads in reorganization for the maintenance and improvement of rail properties. Section 215. In addition, $85 million in subsidies is authorized for the continued provision of essential transportation services. Section 213.

[52] Penn Central Trustees' February 1973 Report, J. Doc. 9 at 1-2.

[53] Penn Central Trustees' April 1974 Report, J. Doc. 10 at 4. The Penn Central Reorganization Court shares the Trustees' view that "the basic approach of the statute is fundamentally sound." Memorandum in Support of Findings and Order No. 1596, *In re Penn Central Transportation Company, Debtor* (E.D. Pa., July 2, 1974), JA 124 at 148. ("*Penn Central* '180-Day' Decision").

I. The Court Below Should Have Denied Equitable Relief and Dismissed the Complaints as to the "Taking" Issues on the Ground that Plaintiffs Have an Adequate Remedy at Law Under the Tucker Act

Plaintiffs alleged in the court below that implementation of the Rail Act would cause, or threatened to cause, a "taking" of their property for public use without just compensation, contrary to the Fifth Amendment to the Constitution. They alleged two sorts of "takings": first, they contended that there would or might be a transfer of rail properties pursuant to the Final System Plan for less than the constitutionally required consideration (alleged "permanent taking"); second, they contended that by allegedly requiring Penn Central to continue operating its railroad until the implementation of the Final System Plan, the Rail Act would or might cause an "interim" or "erosion" taking for which just compensation would be due.

Appellant believes that when the processes of the Rail Act have run their course, no such taking, of either kind, will be found to have occurred. The ultimate determination of this question, however, will depend on facts not of record in this case, events in the future including the actions of USRA and other governmental bodies, and the resolution of many large and complex statutory and constitutional issues whose exact scope will depend on the course of events.

Appellant urged the court below to follow the decisions of this Court in similar cases and decline to inquire into the merits of the taking allegations, on the ground that if future actions under the Rail Act should lay a basis for a claim to compensation beyond the consideration provided for railroad estates under the Rail Act, plaintiffs have an adequate legal remedy in the form of a suit in the Court of Claims under the Tucker Act. The rule of law for which Appellant contended can be simply

stated: an equity court may never enjoin congressionally authorized, otherwise proper federal action on the ground that it may cause a taking for which compensation may be due, because a plaintiff always has another forum, the Court of Claims, in which he can obtain just compensation if his claims are upheld. This is the teaching of *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), and accounts for the fact that, so far as we are aware, no federal court has issued such an injunction between the decision in *Hurley* and the present case.

The court below did not question the principle that equitable relief should be denied, without further inquiry, when there exists an adequate remedy at law. Nor did the majority question the fact that the Tucker Act remedy, if available to railroad estates, would be an adequate remedy.[34] Rather, it ruled that the Court of Claims would not have jurisdiction over any claim for a taking allegedly caused by the Rail Act because the Rail Act does not explicitly make a Tucker Act remedy available. It said that to "read a Tucker Act remedy into the [Rail] Act" would be "judicial legislation on a grand, if not arrogant, scale." JA 9 at 53.

The court below, we respectfully submit, put the Tucker Act question the wrong way around. The century-old Tucker Act needs no supplemental implementing legislation, judicial or otherwise. The remedy is available unless later legislation repeals or modifies it. Nothing in the Rail Act repeals or modifies the Tucker Act and nothing in the Rail Act provides a basis from which repeal or modification can be inferred, especially when the consequence of the inference is to invalidate a major federal statute.

The Tucker Act is the basic jurisdictional statute for suits seeking just compensation from the United States

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[34] The adequacy of the remedy is discussed below at pp. 58-60.

for takings of private property for public purposes. There is no need for Congress, every time it passes substantive legislation that might lead to a taking of private property, to make an explicit or implicit new grant of authority in order for the Court of Claims to exercise its historic jurisdiction. No court, so far as we have been able to discover, has ever required such a supplementary grant of jurisdiction, and no case suggesting such a notion was cited by the court below.

The question, properly framed, is whether Congress, in the Rail Act, took away the Court of Claims' jurisdiction with respect to claims based on actions authorized by the Rail Act. The court below found a congressional intent to bar a Tucker Act remedy, not in the words of the Rail Act, which is silent, nor even in the reports of the congressional committees, none of which discuss the point. Rather, the entire decision rests on several exchanges among individual members on the floor of the Senate and House. But these exchanges, more thoroughly discussed below, show only a congressional intent to restructure Northeast/Midwest rail services in a manner that Congress believed would not result in any taking or transfer of property for less than the "constitutional minimum" value that the Rail Act expressly recognizes to be due. There is no basis in these exchanges for concluding that Congress intended to bar the normal Tucker Act remedy if, contrary to Congress' expectation, the steps taken pursuant to the Rail Act should require transfers for a consideration that the Special Court (and this Court on review) determined to be less than the "constitutional minimum."

Nevertheless, the court below read these portions of the legislative history as showing an affirmative intent in the Rail Act to deny the constitutionally required remedy even if the consideration provided for the transfers under the Final System Plan is eventually found to be less than

the "constitutional minimum." In so doing, as we show below, that court engaged in the very type of judicial legislation from which it professed to abstain.

A. *Repeal of the Jurisdiction of the Court of Claims Under the Tucker Act To Award Just Compensation for Any Taking of Private Property for Public Use May Not Be Inferred from Later Statutes that Do Not Expressly Repeal or Modify that Act and Do Not Provide an Equivalent Remedy*

The Tucker Act, 28 U.S.C. § 1491, confers jurisdiction on the Court of Claims:

> "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Section 1491 is the Court of Claims' "general jurisdictional statute." *Ralston Steel Corp.* v. *United States*, 340 F.2d 663, 668 n.5 (Ct. Cl.), cert. denied, 381 U.S. 950 (1965); *Simon* v. *United States*, 113 Ct. Cl. 182, 190-91 (1949); see also *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967) (dictum), and *Jacobs* v. *United States*, 290 U.S. 13 (1933). One is not required to seek in any later act, no matter how significant, a renewed grant of jurisdiction to the Court of Claims to hear a suit "founded" upon the later act or upon any constitutional claim thereunder, including any claim for just compensation for an alleged taking. The Court of Claims has such jurisdiction under 28 U.S.C. § 1491 unless Congress has in the later act withdrawn it.

In *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for example, plaintiffs sought damages against

a government contractor for land erosion alleged to have been caused by performance of a government construction contract. The statute authorizing the construction contract was silent on claims of government liability to third parties. The Court held that the defendant contractor could not be held liable for carrying out a contract authorized by Congress and found it unnecessary to determine the merits of plaintiffs' argument that they were entitled to recover compensation from the defendant for what amounted to a governmental taking of their property. If a taking had occurred, the Court said, an adequate remedy for compensation existed by way of suit in the Court of Claims, because

> "in the case of a taking by the Government of private property for public use . . . it cannot be doubted that the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution . . . ." *Id.* at 22 (Mr. Chief Justice Hughes).

Hurley v. *Kincaid*, 285 U.S. 95 (1932), is even more directly in point and is, we submit, dispositive of this case. *Hurley* involved a statute authorizing a flood control project and providing for condemnation of any land in the path of planned diversion channels. Plaintiff sought to enjoin work on the project, alleging that his land had not been condemned although his land was in the path of the planned diversion channels. Although the authorizing statute expressly provided that the United States shall have "[n]o liability of any kind . . . for any damage from or by floods" (*id.* at 102 n.2), a unanimous Court, speaking through Mr. Justice Brandeis, held that injunctive relief should have been denied. The Court reasoned that if the acts alleged did constitute a taking, just compensation under the Tucker Act was an available and adequate remedy at law.

Hurley shows how reluctant courts have been to infer that later statutes bar the Tucker Act remedy; the Court

found that remedy available despite a statutory provision expressly barring Government liability for flooding. *Hurley* also is living proof of Chief Justice Hughes' statement in *Yearsley* that if the Government takes property, the remedy to obtain compensation "is as comprehensive as the requirement of the Constitution . . ." (309 U.S. at 22), and demonstrates that a congressionally directed taking cannot be enjoined because a Tucker Act remedy is always available until Congress affirmatively withdraws it.

The Court of Claims' jurisdiction exists even though no taking was intended and even though, apart from the Fifth Amendment, no governmental promise to pay compensation was made at or before the time of taking. *Armstrong* v. *United States*, 364 U.S. 40, 48-49 (1960); *United States* v. *Dickinson*, 331 U.S. 745 (1947); *United States* v. *Causby*, 328 U.S. 256 (1946); *Jacobs* v. *United States*, 290 U.S. 13 (1933); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922); *Richard* v. *United States* v. *Stone Corral Irrigation Dist.*, 282 F.2d 901, 904 (Ct. Cl. 1960). See also *Malone* v. *Bowdoin*, 369 U.S. 643, 647 n. 8 (1962) (dictum).[55] For example, in *Causby*, *supra*, this Court held that the Court of Claims could award compensation on a claim, based directly on the taking clause of the Fifth Amendment, that low and frequent flights

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[55] The earlier cases, such as *Portsmouth Harbor*, reached the result on an implied contract theory. "If the acts amounted to a taking, without assertion of an adverse right, a contract would be implied whether it was thought of or not." 260 U.S. at 330. A similar rationale was used in *Yearsley*. Later cases, such as *Causby*, find the Government's promise to pay in the Constitution itself. Thus it is not necessary to find a promise to pay implied in the legislation which authorizes the taking. Nothing in these cases supports the suggestion that they are limited to situations where Congress did not attempt to prescribe any consideration for the property taken, and *Yearsley* and *Hurley* show that no such limited reading is proper.

of military aircraft took the property of the owner beneath the flight path, even though the Government's intent neither to take nor to pay was clear from its reliance in court on the Air Commerce Act of 1926 granting to the United States "complete and exclusive national sovereignty in the air space" over this country, and to the citizen "a public right of freedom of transit in air commerce through the navigable air space . . . ."[56]

Congress should not be held to have repealed or limited the basic jurisdiction of the Court of Claims without the clearest evidence of an explicit intention to do so. A repeal of the jurisdiction of any federal court may not be lightly inferred. *Federal Sugar Refining Co.* v. *United States*, 30 F.2d 254, 255 (2d Cir. 1929), rev'd on other grounds sub nom. *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, 280 U.S. 320 (1930).[57]

[56] 328 U.S. at 260 (footnote omitted). Of course, the result is different (a) in cases in which there was a mere trespass ("sounding in tort") rather than a taking, *e.g.*, *Temped* v. *United States*, 248 U.S. 121, 129 (1918), and (b) in cases in which the taking was by a federal officer acting outside the scope of his authority. In the latter cases, there is no taking by the United States because, as this Court put it in *Hooe* v. *United States*, 218 U.S. 322, 335 (1910), the officer does not, "in any legal or constitutional sense, represent the United States, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the Government 'founded upon the Constitution.'" This latter theory accounts for the suggestion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952), that there was "doubt" about the ability to recover in the Court of Claims for a taking made by the Executive without statutory authority. Although both the trespass and the lack-of-authority cases sometimes involve difficult distinctions, this case is nowhere near either border because here the actions alleged to threaten a taking are expressly authorized by an act of Congress that is asserted to be unconstitutional "on its face."

[57] *Johnson* v. *United States Shipping Board Emergency Fleet Corp.*, *supra*, does not support the view that Congress intended in enacting the Rail Act to oust the Court of Claims of jurisdiction. The Admiralty Act, the statute involved in *Johnson*, explicitly created another basis for claims against the United States and provided a constitutionally adequate remedy by suits in admiralty. The case thus illustrates only that where the United States creates a right against itself and provides a special and constitutionally adequate remedy, it may make that remedy exclusive. See *United States* v. *Babcock*, 250 U.S. 328 (1919).

With respect to the Court of Claims in particular, Congress' intent to limit its jurisdiction "must be evidenced expressly or by necessary implication." *H. E. Hele* v. *United States*, 100 Ct. Cl. 289, 294 (1943) (statute providing that reasonable value of improvements on tracts occupied by the United States "be determined by the courts of the Canal Zone" did not oust Court of Claims of jurisdiction over suit brought under predecessor of 28 U.S.C. § 1491 for breach of contract arising from failure to pay reasonable value). See also *United States* v. *Pfitsch*, 256 U.S. 547 (1921)."

Moreover, the fact that Congress authorized a limited amount of appropriations and made a limited amount of government-guaranteed obligations available as part of the consideration for acquisition of rail properties, in the belief that the Rail Act would not require the transfer of property for less than the "constitutional minimum," does not indicate that Congress intended to withdraw a remedy if such transfers should occur. In *Fort Berthold Reservation* v. *United States*, 390 F.2d 686 (Ct. Cl. 1968), the Court of Claims held that acquisition of Indian lands under a statute containing a provision fixing a per-acre payment was a taking, for which the Court of Claims could award compensation above the statutory

[58] The court below also relied on the facts that authorizations for emergency assistance under Section 213 of the Rail Act are limited in amount and that Congress had appropriated less than half of the authorized amount. In fact, Congress has now appropriated almost all of the authorized amount. See Foreign Assistance and Related Programs Appropriations Act, 1974, Pub. L. 93-240, 87 Stat. 1048 (Jan. 2, 1974) ($35 million); Second Supplemental Appropriations Act, 1974, Pub. L. 93-305, 88 Stat. 195 (June 8, 1974) ($39.8 million).

per-acre limit. The specification of a per-acre price by Congress was held not to oust the Court of Claims of jurisdiction to award a larger amount as just compensation.

Finally, where a statute that is claimed to repeal by implication the jurisdiction of a court is also claimed to be unconstitutional when so read, the court must adopt any reasonable construction that can save the statute's constitutionality. For more than a century this precept has been invoked to save the constitutionality of statutes where First Amendment rights are involved, *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973); *American Communications Association, CIO* v. *Douds*, 339 U.S. 382, 407 (1950); and to construe in a constitutional manner statutes affecting "existing contracts, rights of actions, or . . . vested rights," *Twenty Per Cent Cases*, 87 U.S. 179, 187 (1873), as well as the Bankruptcy Act itself, *Wright* v. *Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 461 (1937).[39]

B. *The Rail Act Does Not Show an Intent To Deprive the Court of Claims of Its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation*

When Congress intended the Rail Act to override other important federal statutes, it did not rely on judicial inference and conjecture. For example, in Section 601 of the Rail Act, entitled "Relationship to Other Laws," Congress explicitly declared the antitrust laws to be inapplicable to the actions taken to formulate the Final System Plan (Section 601(a)); it declared portions of the Interstate Commerce Act and the Bankruptcy Act to be inapplicable to the extent inconsistent with the Rail Act (Section 601(b)); and it declared certain provisions of the National Environmental Policy Act of 1969 inapplicable to actions authorized by the Rail Act before the effective date of the Final System Plan. Section 601(c). Congress also provided that a railroad in reorganization could discontinue service or abandon rail property only in accordance with the Rail Act, notwithstanding

> "any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority." Section 304(f).

In all, the Rail Act contains no fewer than 13 provisions repealing or making inapplicable provisions of various laws or excluding the jurisdiction of federal courts on various subjects.[40]

There is, of course, no explicit provision relating to the Tucker Act. One searches the Rail Act in vain for a sentence such as "The Court of Claims shall have no jurisdiction over any action alleging that the property of any person has been taken pursuant to this Act without just compensation." The fact that Congress gave meticulous and explicit attention to modifying other laws should at least make one pause before concluding that Congress, without saying so, amended the Tucker Act and implicitly removed the traditional remedy should actions taken pursuant to the Rail Act give rise to a claim for just compensation for a taking of property.

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[39] The decision below also violates the rule of construction that repeal of a statute is not to be inferred unless there is no other reasonable way to construe the subsequent statute. *E.g.*, *Amell* v. *United States*, 384 U.S. 158 (1966); *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963); *FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193 (1946); *Nagano* v. *McGrath*, 187 F.2d 759, 766-67 (7th Cir. 1951), aff'd by an equally divided court, 342 U.S. 916 (1952); *Fawcett* v. *C.I.R.*, 149 F.2d 433, 435 (2d Cir. 1945).

[40] In addition to those cited in the text, see Sections 202(a), 205(c)(2), 206(d)(3), 207(b), 209(a), 209(b), 303(b)(2), 303(d), and 304(c).

Nor do any provisions of the Rail Act imply that the Court of Claims is to be deprived of jurisdiction. The Act's statement of congressional findings and purposes emphasizes the essential nature of the rail services which the Act seeks to preserve, the immediate threat to those services, the necessity for prompt and substantial action by the federal government to protect those services, and the need to provide federal financial assistance "at the lowest possible cost to the general taxpayer." Section 101(b)(6). These goals—not the desire to deny access to the Court of Claims—explain the few provisions of the Rail Act that the court below relied on as evidence of an intent to amend the Tucker Act.

The court below apparently inferred an intent to repeal the Tucker Act from Section 209(b), providing that "all judicial proceedings with respect to the final system plan" shall be consolidated before the Special Court, and from the further provision in Section 303(d) for appeal from the Special Court's determinations and findings directly and exclusively to this Court.[61] In the first place, as a matter of language, a suit against the United States for compensation for erosion that occurs while the Act's processes work is not, on any normal reading of the words, a "proceeding with respect to the final system plan." More fundamentally, the purposes of these provisions, as expressed by Senator Javits, have nothing to do with excluding suits against the United States:

> "Our experience in the environmental field indicated what a mess can be made of the best laid plans by a diversity of legal proceedings all over the Nation, with different theories canceling each other out very often, and not resolvable until you get to the Supreme Court, and sometimes not even then. Here, by exercising the authority we first exercised

[61] JA 9 at 46-49, 51.

> in the Judiciary Act of 1789, we have provided for consolidating these proceedings and appointing a special court for the purpose. I think it is [a] very, very gifted position, for which the Committee is entitled to great credit." 119 Cong. Rec. S23,780 (daily ed. Dec. 21, 1973).

The function of the Special Court is to prevent a multiplicity of suits in different courts on such questions as the value of the rail properties transferred to Conrail and of the consideration received by the transferors.[62] A subsequent suit against the United States in the Court of Claims would neither infringe upon the Special Court's functions nor invalidate the congressional purpose in consolidating the valuation proceedings. Indeed, if the Special Court (and the Supreme Court on review) found the values of the rail properties transferred to be greater than the values of the consideration provided therefor, so that the consideration fell below the "constitutional minimum," these values would presumably be binding on the private parties in any subsequent Court of Claims suit.[63] Whether or not these determinations were technically binding on the United States,[64] they would still be dispositive, as a practical matter, of the same issues in the Court of Claims.

The court below also referred to Section 303(c), which specifies how the Special Court shall determine "fair and equitable" compensation and states the means (not including a judgment against the United States) by which the Special Court could remedy any deficiency, as showing an intent to bar subsequent claims under the Tucker

[62] House Report at 52.

[63] See *Marine Insurance Co.* v. *United States*, 410 F.2d 764 (Ct. Cl. 1969); *Clement* v. *United States*, 140 F.Supp. 573 (Ct. Cl. 1956).

[64] See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

Act.[65] But the court below ignored the provisions of Section 303(c) that equate "fair and equitable" with "constitutional minimum." Those provisions require the Special Court to determine whether the value of the consideration to be received by each rail estate is "fair and equitable" and whether it is "more fair and equitable than is required as a constitutional minimum," in which event Section 303(c)(3) instructs the court to adjust the consideration down to that level.

The quoted language and the entire structure of Section 303(c) show beyond doubt that Congress intended to provide compensation out of the means provided by that section that would equal the "constitutional minimum"—no more and no less. It cannot be fairly construed to mean that Congress intended to provide *less* than the "constitutional minimum." Accordingly, it cannot be construed to mean that if the Special Court (and the Supreme Court on review) should ultimately find that the value of the consideration available for award under Section 303(c) to any rail estate is less than the "constitutional minimum," Congress intended to deny the traditional Tucker Act remedy for the difference. Compare *Fort Berthold Reservation* v. *United States*, *supra*, holding that a statutory per-acre price for transferred lands did not bar the Court of Claims from awarding compensation above the statutory price. To infer here that the statutory consideration is exclusive even if below the "constitutional minimum" recognized in the statute is to suggest that Congress deliberately intended to act in an unconstitutional manner.[66]

[65] JA 9 at 50-51.

[66] Such an inference would contradict the flat statement of Representative Adams, for example, that consideration other than Conrail common stock was to be "at the lowest possible limit to meet the constitutional guarantees." 119 Cong. Rec. H11,876 (daily ed. Dec. 20, 1973).

C. *The Legislative History Does Not Show an Intent To Deprive the Court of Claims of Its Tucker Act Jurisdiction To Hear Any Case Claiming Just Compensation*

The most plausible reading of the Act and its legislative history is that Congress believed that Conrail would be a viable and profitable entity[67] and that as a result Conrail's securities plus government-guaranteed USRA obligations, deficiency judgments against Conrail, if necessary, and "other benefits" would have a value equal to the consideration due to the railroad estates—the "constitutional minimum." The House Report expressly declared the belief that stock in the reorganized system plus other securities and consideration would in fact prove constitutionally adequate:

> "The Committee intends that the valuation of the common stock be based on the intrinsic value of that stock, taking into account the full benefits to be realized from the reorganized rail system embodied in the Final System Plan. The Committee expects that the intrinsic value of the stock of [the] new Corporation will be found to be at least equal to the fair and equitable value [*i.e.*, the "constitutional minimum" referred to in Section 303(c)] of the rail properties conveyed in exchange."[68]

[67] See, *e.g.*, Senate Report at 18; House Report at 54; 119 Cong. Rec. S23,783 (daily ed. Dec. 21, 1973) (remarks of Senator Hartke); *id.* at S23,778 (remarks of Senator Beall); 119 Cong. Rec. S22,485 (daily ed. Dec. 11, 1973) (remarks of Senator Hartke); 119 Cong. Rec. H9743 (daily ed. Nov. 8, 1973) (remarks of Representative Kuykendall).

[68] House Report at 54. The intent to act constitutionally appears as well from other passages in the House Report, such as:

> "The Committee feels that this legislation is the most preferable alternative for a solution to the crises in the Northeast. It feels that this legislation takes into account the many Constitutional problems interwoven into the various bankruptcies involved." *Id.* at 29; see *id.* at 47.

[Footnote continued on page 54]

The House Report also stated at 55:

> "The Committee is of the opinion that provisions of this title of the Act, and especially the provision for deficiency judgment and payment of obligations of the Association provided in the preceding subsection, are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim."[18]

Congress plainly intended to provide constitutionally adequate compensation to the owners of the rail properties transferred to Conrail. Whether the consideration specifically provided in the Act will be adequate for that purpose is both premature and, for the purpose of this argument, beside the point. There is nothing in the legislative history to support the view that *if* the consideration is eventually found by the Special Court (and by this Court on review) to be less than "fair and equitable"—*i.e.*, less than the "constitutional minimum"—Congress intended to foreclose a Court of Claims remedy for the difference.

The few statements on the floor of the Senate and House quoted by the court below to show that Congress intended to bar subsequent claims under the Tucker Act prove no such thing.[19] They reinforce the view that Con-

[18] [Continued]

See also 119 Cong. Rec. H9731-32 (daily ed. Nov. 8, 1973) (remarks of Representative Adams); *id.* at H9742 (remarks of Representative Kuykendall).

[18] In both of the above quotations, as Section 303(c) clearly shows, the Committee regarded "fair and equitable" as effectively synonymous with the "constitutional minimum." See also House Report at 2, 31, 43.

[19] The majority opinion below professed to be guided in construing the Rail Act by Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947). Mr. Justice Frankfurter's reflections included the following at 543:

[Footnote continued on page 55]

gress thought it was providing constitutionally adequate consideration under the Act. They indicate nothing about the intention of Congress in the event that the consideration provided under the Act should be found by the Special Court to be less than the "constitutional minimum."

On the Senate Floor, in commenting on the Conference Report, Senator Hartke stated:

> "If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of these people could make a claim against the Government which could be sustained in the Court of Claims." 119 Cong. Rec. S23,783-84 (daily ed. Dec. 21, 1973).

The Senator's speech does not support the inference apparently drawn by the court below (JA 9 at 48-51) that should the Special Court find the value of the consideration paid to a rail estate to be less than "fair and equitable" and therefore less than the "constitutional minimum," Congress intended to deny a remedy under the Tucker Act and thereby to effect a "taking" for less than just compensation. Indeed, Senator Hartke's words can fairly be read to recognize the continuing availability of a suit in the Court of Claims, and merely to predict that the public funding, the plan of reorganization and consolidation, and the forms of consideration provided

[19] [Continued]

> "[Statements] made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.
>
> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."

This is not to suggest that the statements under discussion were not well considered. On the contrary, they were carefully addressed to a different point from the one that concerned the court below.

under the Act would be sufficient [71] to prevent such a claim from being "*sustained* in the Court of Claims." (Emphasis added.)

No different light on what Congress meant is cast by the portion of House debate set forth in the opinion below at JA 9 at 49. The dialogue focuses on "the deficiency judgment" and whether Section 303 would keep "the Federal court," *i.e.*, the Special Court, from having "the key to the Treasury" in "the court proceedings." [72] Because the context of this dialogue was not brought to the attention of the court below, that court may have gravely misconstrued its meaning. Neither the Senate nor the House bill contained a counterpart to Section 303(c)(2)(C), providing for a deficiency judgment in money against Conrail.[73] This provision was added in conference; the subsequent House discussion seems clearly intended to explain it and to assure members that any such money judgment against Conrail would not be a judgment against the United States. Representative Kuykendall's several references to "the Federal Court" and "the court proceedings" are, we submit, clearly references to the Special Court and its authority added in Section 303(c)(2)(C). Representative Adams' careful response that there was a limit to authorizations "under the bill" was entirely correct. As we read the dialogue, he was not asked and did not volunteer a view as to whether there could be liability of the United States otherwise than "under the bill"

[71] Senator Hartke expected Conrail to be profitable, as is demonstrated by his comments cited at p. 53 note 67 *supra*.

[72] 119 Cong. Rec. H11,876 (daily ed. Dec. 20, 1973).

[73] See Section 303(c)(2) of the Senate bill, 119 Cong. Rec. S22,820 (daily ed. Dec. 13, 1973) and Section 502(d) of the House bill, 119 Cong. Rec. H9756 (daily ed. Nov. 8, 1973). Both versions authorized the Special Court to award additional Conrail or USRA securities to railroads in reorganization, but neither authorized the entry of a money judgment against either.

if, despite Congress' expectation to the contrary, the consideration available under Section 303(c) were judicially determined to be less than the "constitutional minimum." Indeed, the dialogue itself stressed Mr. Adams' concern that any amount other than Conrail securities "was to be at the lowest possible limit *to meet the constitutional guarantees.*" (Emphasis added.)

Earlier Mr. Adams had stated his view that the constitutional minimum in a reorganization is liquidation value, and asserted that "we have done everything possible in the legislative history . . . to make certain that no more than the *constitutional minimum* for liquidation as defined by the Supreme Court will be paid by the new corporation . . . ." [74] Mr. Adams, we submit, was contrasting a congressional commitment to consideration equal to liquidation value for non-rail purposes—which he regarded as constitutionally necessary and was willing to support—with an open-ended commitment estimated at up to $15 billion as the cost of "nationalizing" the properties, as some members of Congress had urged."[75]

We do not believe that this Court can fairly read the language in the dialogue about keeping "the Federal Court" from having "the key to the Treasury" as referring to claims against the Government for the amount, if any, by which the value of the consideration trans-

[74] 119 Cong. Rec. H9732 (daily ed. Nov. 8, 1973) (emphasis added). Appellant does not accept the view that liquidation value is the constitutional minimum. Creditors and shareholders would appear to be entitled to liquidation value only if they have an underlying constitutional right to liquidate. Whether there is a constitutional right to liquidate an essential railroad that is, or can be made, viable has never been decided. The issue was expressly reserved by this Court in *New Haven Inclusion Cases*, 399 U.S. 392, 489-490 (1970).

[75] *Id.* at H9731.

ferred under the Act might some day be found by the Special Court (and on appeal by this Court) to fall below the "constitutional minimum." The inference that Congress intended to bar a claim under the Tucker Act for this difference does not square with its express recognition in Section 303(c) of the need to provide the "constitutional minimum."

To summarize, there are two possible ways to read the Rail Act in relationship to the Tucker Act. One is to agree with the court below that even if the Special Court should ultimately find the consideration available to be paid for rail properties under the Act to be less than the "constitutional minimum," Congress intended to bar a Tucker Act claim for the difference. A second is to conclude that Congress, believing that the value of the consideration available under Section 303 would in fact equal the "constitutional minimum," never addressed itself in the Rail Act to the question of what would happen if the Special Court found to the contrary.

We respectfully submit that the first reading, if it is possible, is not plausible since it requires the conclusion that Congress, in a statute expressly and repeatedly recognizing the existence of a "constitutional minimum," also decided to bar a claim to obtain that minimum. We further submit that under the second reading, the Tucker Act remedy must be found to remain available, and the Rail Act must be found constitutional.

D. *The Tucker Act Remedy Is Adequate*

Having concluded that Congress meant to repeal or modify the Tucker Act, the majority of the court below did not examine the adequacy of the Tucker Act remedy. However, the concurring judge questioned the due process adequacy of relegating claimants to the "lengthy and complex" procedures of the Rail Act and then, if there

should remain a basis for a claim against the United States, to the Court of Claims.[76] No rule of due process holds that a process that results in full and complete compensation is unconstitutional merely because it may be lengthy and complex."[77]

Three points deserve mention. First, even in a condemnation case, which reorganization under the Rail Act is not, it is unquestionably constitutional to complete a "taking" before a judicial determination of the required amount of compensation.[78] Second, a Court of Claims award of compensation for an inadequately compenstated taking under the Rail Act would be a "perfect" remedy: although interest is not generally recoverable against the United States in the absence of a statute or contract expressly authorizing it,[79] interest on a just compensation award runs from the date of the taking.[80] Third, as we have noted above, a Tucker Act suit after the Special Court (and the Supreme Court on review) had

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[76] JA 9 at 81. These doubts were not so serious as to prevent the same judge from concluding in the *Penn Central* "180-Day" Decision at JA 124 at 148 that:

> "I agree with the Trustees that the basic approach of the statute is fundamentally sound. If I were persuaded that Congress had intended to permit recourse to a Tucker Act remedy in the event that implementation of the RRRA [Regional Rail Reorganization Act] proved violative of constitutional rights, an affirmative § 207(b) finding might be permissible."

[77] See *Phillips* v. *Commissioner*, 283 U.S. 589, 596-99 (1931).

[78] *Hurley* v. *Kincaid*, 285 U.S. 95 (1932). Moreover, as indicated in the discussion below of the *New Haven Inclusion* litigation, there is precedent in the reorganization field for transfer before valuation or payment.

[79] 28 U.S.C. § 2516; *United States* v. *Goltra*, 312 U.S. 203, 207-08 (1941); *Gould* v. *United States*, 301 F.2d 557, 558-59 (D.C. Cir. 1962).

[80] *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Phelps* v. *United States*, 274 U.S. 341, 344 (1927).

found the relevant values would not, as a practical matter, require retrial of these issues."[51]

II. Even in the Absence of a Tucker Act Remedy the Court Below Should Not Have Enjoined the Operation of the Rail Act

Even if the court below correctly construed the Rail Act to bar a Tucker Act remedy for erosion beyond constitutional limits, each element of its order was erroneous. The order rested on other misconstructions of the statute. It anticipated problems that may not arise and can be remedied at the time if they do. Moreover, even on the district court's stated view of both the law and the facts, the relief it granted, relief whose most crucial features were wholly unexplained, was superfluous.

The court below held that the erosion issue was "ripe for adjudication," but it did not in fact decide whether or to what extent the asset values available to satisfy pre-reorganization creditors have declined during the Penn Central reorganization or will decline in the future. Nor did the court decide the extent to which pre-reorganization creditors may be required to accept such "erosion" during the reorganization process, on account of the public interest in continued rail service, where, as here, there is a reasonable prospect of reorganizing the railroad on a self-sustaining basis. We argue, in Part III below, that the extent of any erosion problem cannot

[51] Concerns that Congress might not appropriate funds to pay a judgment do not vitiate the adequacy of a Tucker Act suit. No such concern was mentioned in *Yearsley* and *Hurley, supra*. Moreover, in concluding that the Court of Claims is an Article III court, Mr. Justice Harlan rejected an argument to the contrary based on that court's inability to enforce its judgments, saying "there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 571 (1962). None of the other opinions in that case challenged his view.

be determined on the present record and without reference to the benefits of reorganization under the Rail Act, and that in any event a reasonable erosion burden may be imposed on persons who invest in a railroad while prompt and substantial public efforts are made to create a "self-sustaining rail service system." Our argument here is that even if it is assumed that the constitutional limit of erosion—the point beyond which service may not be required without an adequate remedy at law for compensation—may be reached before implementation of the Final System Plan, and even assuming that the court below correctly read the Rail Act to bar an adequate remedy at law, the orders issued by the court below were nevertheless unwarranted and erroneous.

A. *The Court Below Misconstrued Section 304(f) of the Rail Act*

Before passage of the Rail Act, Section 1(18) of the Interstate Commerce Act[52] required any railroad (whether or not in reorganization) to obtain ICC approval for discontinuance of rail service on any line of track, or for the abandonment of such rail properties. This procedure was replaced, with respect to railroads in reorganization in the Region, by Section 304 of the Rail Act. Section 304, whose primary purpose is to provide a more efficient means for a substantial reduction and streamlining of the Northeast/Midwest rail system, permits the Region's railroads, without the approval of any governmental entity, to discontinue service over and to abandon (*i.e.*, liquidate as they wish) all rail properties

[52] 49 U.S.C. § 1(18) provides in pertinent part:

"[N]o carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

not designated for transfer pursuant to the Final System Plan.

In order, however, to facilitate a planning process that is required to be completed within 450 days after enactment, Section 304(f) provides as follows:

> "After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action, notwithstanding any provision of any other Federal law, the constitution or law of any State, or decision or order of, or the pendency of any proceeding before any Federal or State court, agency, or authority."

As we read the opinions and order of the court below, all of the court's objections to the Rail Act (except one minor point)[83] flow from its interpretation of that Section.

The district court interpreted Section 304(f) as authorizing the required continuation of rail operations after the (hypothetical) point has been reached at which continuation of service can no longer be constitutionally required without compensation. Having construed the section to authorize an unconstitutional action in a hypothetical situation, the court declared the section to that extent unconstitutional on its face.

In the first place, the court reached its troublesome construction prematurely. Having concluded that the

[83] The one exception is the court's holding that the requirement, in Section 207(b), that Section 77 proceedings be dismissed in the case of certain railroads not being reorganized under the Rail Act, violates the requirement of Article I, Section 8, Clause 4, of the Constitution that bankruptcy laws shall be uniform throughout the United States. USRA does not agree with this ruling but, in view of the fact that the ruling has no material effect on USRA's planning process, USRA has not appealed on this question.

erosion issue was "ripe for adjudication," the court proceeded not to adjudicate whether the constitutional limit of erosion had been or would be reached, nor to define the limit. Instead, the district court proceeded as if the erosion limit had in fact passed, when in fact it remains possible that the issue will never arise.

The objections to premature decision of hypothetical legal issues, particularly on an incomplete factual record, are too familiar to be repeated at length here.[84] The district court itself recognized the dangers in another context. JA 9 at 23. Suffice it to say that the objections to premature decision are especially forceful where there is a major question of statutory construction which relates directly to the constitutionality of the statute and the decision is adverse to constitutionality. *E.g.*, *Poe* v. *Ullman*, 367 U.S. 497, 502-03 (1961); *Communist Party*

[84] "Courts do not review issues, especially constitutional issues, until they have to." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring). A court should stay its hand when the injurious impact of the challenged condition depends on the "concurrence of . . . contingent events . . . too speculative to warrant anticipatory judicial determinations." *Eccles* v. *Peoples Bank*, 333 U.S. 426, 432 (1948). Courts, moreover, do not adjudicate "matters of serious public concern" on a record that is not "adequate and full-bodied." *Public Affairs Press* v. *Rickover*, 369 U.S. 111, 112-13 (1962). *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256 (1948).

The courts reviewing the inclusion of the New Haven in the merged Penn Central illustrated these rules by refusing to decide issues that were premature or where the factual record was incomplete. *E.g.*, *In re New York, N.H. & H.R.R.*, 378 F.2d 635, 640 (2d Cir. 1967):

> "Since we thus are by no means certain the plan the Commission and the court will approve . . . will contain the features to which appellants object, we think it improper to pass upon their objections at this time.
>
> ". . . [T]here was no occasion to involve Judge Anderson or us in an advisory opinion to the Commission on legal issues that may never arise."

See also *New Haven Inclusion Cases*, 399 U.S. 392, 447 n. 65 (1970).

v. *Subversive Activities Control Board*, 367 U.S. 1, 81 (1961); *International Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222 (1954); *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419 (1938).

Having decided to reach the erosion issue, the district court then took a second headlong leap into the path of a constitutional problem. Although it had construed the Rail Act to bar a Tucker Act remedy for erosion past constitutional limits, the court decided to construe Section 304(f) as purporting to confer authority to require continuation of rail service even where discontinuance is required to protect constitutional rights. This construction was wholly unwarranted. In the assumed absence of a remedy at law, Section 304(f) could and should have been construed to confer approval power only within constitutional limits as the courts may declare them. A statute cast in general terms need not recite the constitutional limits on its reach in order to avoid being declared unconstitutional on its face. If it is inferred that Congress barred suits in the Court of Claims for required erosion beyond constitutional limits, the entire statutory scheme could nevertheless function as fairly (though possibly less successfully) if it were also inferred that Congress intended to require continued operations only within constitutional limits.[64]

No rule of construction is more well established than the rule that federal courts should accord acts of Congress a "strong presumptive validity" and seek an "interpretation which supports the constitutionality of legislation." *United States* v. *National Dairy Products Corp.*,

[64] There are, of course, substantial problems in determining, in any actual case, whether discontinuances or abandonments are constitutionally required. The resolution of that problem in individual cases, however, is no easier after the decision below than it was before, since the court offered no guidance on either the substance or procedures involved in that determination.

372 U.S. 29, 32 (1963).[65] There are numerous cases in which federal courts have gone to considerable lengths to construe statutes to uphold their constitutionality. The case of *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331 (1928), is a good illustration.[66] As the law stood immediately before July 1, 1918, the owner of a patent infringed by a government contractor could ordinarily sue either the contractor or the United States. If the owner were an assignee, however, his suit against the United States would be barred by the general statute prohibiting assignment of unliquidated claims against the United States. On July 1, 1918, Congress passed a new statute depriving a patent owner of a suit against a government contractor and limiting him to his remedy against the United States. The 1918 statute, together with the general anti-assignment statute, thus appeared to prevent an assignee from suing either the contractor or the government. The Court, noting that this result "'would seem to raise a serious question as to the constitutionality of the Act of 1918 under the Fifth Amendment,'" *id.* at 345, and stating that "[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality," *id.* at 346, interpreted the 1918 statute as making the general anti-assignment statute inapplicable to patent rights covered by the 1918 statute, so that the assignee could sue the United States in the Court of Claims.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), a unanimous Court held that the Sherman Act does not prohibit a

[65] *Accord, e.g., United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548, 571 (1973); *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

[66] See also *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946).

conspiracy or combination to influence the passage of legislation or the enforcement of the laws, even where the objective is to harm competition and the means used are deceptive. The Court reached its construction of the statute by considering policies underlying the First Amendment and, in part, because a contrary construction "would raise important constitutional questions." *Id.* at 138. Similarly, in *Kent* v. *Dulles*, 357 U.S. 116 (1958), when faced with a constitutional challenge to regulations of the Secretary of State governing the issuance of passports, the Court decided that the statutory power of the Secretary, though "expressed in broad terms," *id.* at 127, should be construed more narrowly so as to avoid constitutional questions. This case is a good example of the rule that a delegation in broad terms should be narrowly construed to avoid constitutional questions rather than broadly construed and then struck down.[65]

B. *The 304(f) Injunction Was Unwarranted and Erroneous*

The court below then enjoined USRA from

> "taking any action to enforce the provisions of Section 304(f) of the Regional Rail Reorganization Act of 1973, with respect to any abandonment, cessation, or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." JA 9 at 82.

This injunction against a federal agency just starting, in good faith, on the Herculean task Congress assigned it was unwarranted and erroneous.

[65] The *Kent* case divided the Court 5-4 on the statutory issues, and neither the majority nor the dissent reached the constitutional issues. There is no suggestion, however, that the dissenters disagreed with the general principle of using narrow construction to avoid constitutional issues.

As we read the injunction, it applies only after and to the extent that some federal court (presumably a Reorganization Court) has declared that an abandonment, cessation or reduction of service is constitutionally necessary.[66] If that is what the district court meant, USRA, had it been asked, would have assured the district court, and now assures this Court, that it has no intention of violating any constitutional rights so declared. In any event, there was no reason why the federal court making the hypothetical constitutional determination could not have been left the task of issuing appropriate orders to enforce it. Reorganization Courts, which under the Rail Act retain their present jurisdiction over the railroad estates and their interim operations, have amply broad powers to provide injunctive protection of the estates over which they have jurisdiction.[67] A Reorganization Court

[66] We assume that the court did not mean to prohibit USRA, should an appropriate occasion arise, from seeking review of any such determination, and we therefore assume that the court was speaking of a final and unreviewable constitutional determination by a federal court.

[67] Compare, for example, Paragraph 9 of Order No. 1, issued June 21, 1970 in *In re Penn Central Transp. Co.*, Bky. No. 70-347 (E.D. Pa.):

> "9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the opera-

finding it constitutionally necessary to order a discontinuance of service or abandonment of properties would have as much power both to make this finding and to have the resulting orders carried out without the injunction issued by the district court as it has in light of the injunction.

C. *It Was Error To Declare Section 303 of the Rail Act Partially Unconstitutional on Its Face*

Section 303 of the Rail Act provides generally that the Special Court shall order transfers of rail properties in accordance with the Final System Plan, and shall then order the distribution of the consideration provided therefor after determining that the exchanges are

> "in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of the Bankrupty Act . . . ."

and that the exchanges are not "more fair and equitable than is required as a constitutional minimum."

In context, it is clear that Congress meant the term "fair and equitable" to refer to an exchange in which each estate receives the "constitutional minimum" consideration—no more and no less. Congress thus exhibited its concern, throughout Section 303, that each railroad estate receive the constitutionally required consideration for its properties.

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tion of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and provided, further, that the title of any owner, whether as trustee or otherwise, to rolling stock equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order."

Plaintiffs challenged the Rail Act on the ground that the total consideration available under the Act cannot or may not be sufficient to achieve the congressional objective of providing each estate the "constitutional minimum" consideration, and on the ground that in any event the processes of the Act do not adequately assure that this stated objective will be achieved. The court below put aside these challenges as premature."

" Appellant's position is that since Plaintiffs were alleging only a taking or threatened taking of their property without just compensation, and since the Tucker Act provides an adequate legal remedy should any such taking result from the processes of the Rail Act, the court below should have followed the decision of this Court in *Hurley* v. *Kincaid*, *supra*, and avoided the difficult statutory and constitutional issues by leaving Plaintiffs to their plain and adequate remedy at law. See Part I, *supra*.

On the assumption that the court below correctly construed the Rail Act to bar a Tucker Act remedy, we agree that the question whether the consideration available under the express terms of the Rail Act itself will meet the constitutional minimum is premature: (a) It is impossible to determine at this time the value to which the estates will be entitled; among many other difficulties, the properties to be included in the Final System Plan have not been identified. (b) It should be assumed that the procedures carefully designed after long study by Congress will be able to achieve the statutory goal of a "self-sustaining rail service system" and that the rail properties transferred to Conrail will therefore have substantial going-concern value; the dollar amount of this value, however, is obviously incalculable today. (c) If, after the Final System Plan has become effective, there are grounds for contending (in the assumed absence of a Tucker Act remedy) that its implementation will cause a taking of private property for less than just compensation, these grounds can be urged upon the Special Court during the period of up to 110 days between the effective date of the Final System Plan and the date on which the Special Court is directed to order the transfer of rail properties; if these grounds appear substantial, the Special Court may then decide that it cannot constitutionally order the transfer until the constitutional issue has been resolved; this theoretical possibility does not make it necessary to resolve the series of complex statutory and constitutional issues involved until there is some basis for concluding that the processes of the Rail Act have failed to provide the "constitutional minimum" consideration that Congress commanded.

Nevertheless, the court below declared that

> "Section 303 of the Regional Rail Reorganization Act of 1973 is null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan pursuant to the statute." JA 9 at 82.

Reading that part of the court's order, one might assume that the court below concluded that *all* such "interim erosion" is compensable under the Fifth Amendment. We argue in Part III, *infra*, that any such conclusion would be erroneous. In fact, the court below reached no such conclusion. On the contrary, the court did not define "erosion" or its constitutional limits, and did not determine that the point has been or will necessarily be reached at which erosion becomes compensable. The closest the court below came to stating its view of the law of erosion was in footnote 23, JA 9 at 41, where it quoted as follows:

> "'[T]here are limits beyond which . . . [the] public interest cannot be served without violating the constitutional prohibition against appropriation of private property for public use without just compensation. New Haven Inclusion Cases, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1971); *cf.* Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U.S. 396, 40 S.Ct. 183, 64 L.Ed. 323 (1920). These limitations are measured both in terms of the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and in terms of the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise.' *In Re Penn Central Transportation Company*, 347 F.Supp. 1346, 1366 (E.D. Pa. 1972)."

We read the court's order, therefore, as declaring Section 303 unconstitutional only insofar as it fails to provide compensation for erosion that is determined to exceed constitutional limits unless an adequate remedy at law for compensation is provided. This part of the order, so read, parallels the court's Section 304(f) injunction in which the court left the determination of the actual limit to a future court.

So read, the court's Section 303 order is premature for the same reasons as its Section 304(f) injunction; it deals with a situation that has not arisen and may not arise. There are, however, even more fundamental objections: the court's reading of Section 303 was erroneous and the court's order, on its own view of the issues, was superfluous.

In the first place, there was no reason to read Section 303, with its repeated emphasis on fairness, equity, and the "constitutional minimum" consideration, as deliberately excluding one element of that consideration, that the court below thought might turn out to be constitutionally required. On the contrary, if it is later determined that the constitutional limit of erosion has been reached, and if the Act is construed to require rail operations to continue beyond that point, then this must be taken into account when the Special Court measures the "fairness and equity" of the exchanges. Rather than presume, in the face of clear congressional concern for constitutionality, that Congress deliberately intended an unconstitutional result in the hypothetical situation the court itself constructed, the court below could have solved its own problem by construing Section 303's "constitutional minimum" to include all constitutionally required consideration.[92]

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[92] As a practical matter, there would be no insurmountable difficulty if the Special Court ruled, for example, that the "constitu-

There is, however, an even more obvious point. Rail estates in reorganization are entitled to compensation for erosion only to the extent that the United States requires them to continue rail operations or preserve their properties beyond the point at which uncompensated erosion can no longer be required. The only section of the Rail Act that could conceivably impose such a requirement is Section 304(f). We have argued above, in Part II(A), that the court below could and should, in the assumed absence of a Tucker Act remedy, have construed Section 304(f) as not imposing any such requirement. Instead, the court below construed Section 304(f) as imposing such a requirement but then declared the Section *pro tanto* unconstitutional and enjoined the enforcement of the objectionable requirement. At that point, the court had achieved by constitutional adjudication what it could have achieved by construction: it eliminated any requirement in the Rail Act that rail estates suffer any erosion for which an adequate remedy for compensation would be constitutionally required. In so doing, it eliminated any possible claim to compensation.

Once any Reorganization Court has determined that discontinuance of service or abandonment is constitutionally required in the absence of compensation, USRA (and the other Defendants) will be powerless to interfere and, unless provision is made for compensation satisfactory to the Reorganization Court, the discontinuance or abandonment will occur. Under these circumstances, there was no basis for invalidating Section 303 for an imputed failure to provide compensation for an "erosion taking" that cannot lawfully occur.

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tional minimum" is the amount necessary to place the Penn Central estate in the position it would have been in had the transfer occurred on some earlier date determined by the Special Court to be appropriate.

D. *The District Court Should Not Have Enjoined Certification of a Final System Plan Under Section 209(c)*

Section 209(c) of the Rail Act provides that after the Final System Plan has been prepared and reviewed by Congress and has become effective, USRA shall "deliver a certified copy of the final system plan to the special court" and shall certify to the Special Court, among other things, that the Plan is in the public interest and is fair and equitable. This step is obviously central to the processes of the Act. The court below, however, enjoined USRA from "certifying a Final System Plan to the Special Court pursuant to Section 209 (c)." JA 9 at 82. The injunction appears to be unqualified and unconditional.

While this part of the court's order presents the most significant obstacle to USRA's discharge of its statutory responsibilities, USRA is somewhat at a loss to respond to it because the court below offered no explanation whatsoever of the reason for this particular order. Section 209(c) is mentioned only twice in the court's opinion, once at JA 9 at 16 where its existence and text are recited without comment as part of a general summary of the Rail Act, and once in the second-to-last paragraph of the principal opinion, which, immediately after discussion of the Tucker Act question, reads in its entirety as follows:

> "Accordingly, we hold that Section 304(f), in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits, offends the Fifth Amendment; that Section 303, the only provision of the Act pertaining to valuation of the railroad estate, in failing to provide a remedy for any unconstitutional erosion caused by mandatory interim operations under Sec-

tion 304(f), is also defective; that because the effect of Section 207(b) precludes a form of liquidation under Section 77 of the Bankruptcy Act, it is constitutionally defective as set forth in Part II of the separate opinion of Judge Fullam; and that because of these conclusions the United States Railway Association must be enjoined from certifying a Final System Plan to the Special Court pursuant to Section 209(c)." JA 9 at 53.

It is unclear what evil the court thought it was remedying with this order.[68] The only conceivably relevant constitutional objection to the Rail Act is the assumed failure of the Act to deal with the possible problem of erosion beyond constitutional limits. As discussed above, this problem may never arise in fact. Moreover, any possibility of its arising could have been avoided by a construction of Section 304(f) that would not allow USRA to require continued operations after the point of unconstitutional erosion has been reached, or by a construction which presumes that the Special Court will take such operations into account when determining the consideration under the Act necessary to satisfy the "constitutional minimum." In any event, the court below has more than adequately eliminated any possible problem by prohibiting the application of Section 304(f) to require erosion beyond constitutional limits. Finally, there was no reason for an unconditional order prohibiting the certification of *any* final system plan, even one that makes full and adequate provision for all constitutional rights of the private parties.

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[68] One thing that seems clear is that the 209(c) order to which we are now objecting has nothing to do with the 207(b) problem referred to in the quoted paragraph, from which no appeal is taken. The 207(b) problem, as described in Judge Fullam's separate opinion, relates only to the question whether Section 77 proceedings should be dismissed in the case of railroads that are *not* to be reorganized under the Act.

III. There Is No Factual or Legal Basis for Concluding that the Rail Act Will Cause an "Erosion Taking" of Private Property for Which Just Compensation Will Be Due

We have presented two reasons why it was unnecessary for the court below even to reach the constitutional merits of Plaintiffs' claims that the Rail Act will cause a taking of their property through erosion: First, Plaintiffs have an adequate remedy at law under the Tucker Act, which precludes their obtaining injunctive relief against the implementation of the Rail Act. Second, in the absence of the Tucker Act remedy, the Rail Act should not have been construed to require rail operations beyond the point at which compulsory operations become compensable. The court below failed to adopt either of those propositions, but proceeded to decide that the danger of an erosion taking justified its enjoining the implementation of key provisions of the Act. Having erred in dealing with the Tucker Act and statutory construction issues, that court committed further error, we submit, in its handling of the erosion contentions.

The court below decided that the erosion issue is "ripe for adjudication"—meaning, apparently, that available statistics indicate that Plaintiffs' fears that the value of their claims will decline between now and the effective date of the Final System Plan (as early as 510 days from enactment) cannot be dismissed as far-fetched. The court then proceeded, however, to grant broad injunctive relief without ever facing the questions that must be decided to adjudicate the erosion issue. Should this Court conclude that it is necessary to reach that issue, we submit that there are two controlling reasons why it was error for the court below to grant injunctive relief on the ground that erosion pending implementation of the Rail Act might exceed constitutional limits.

In the first place, the record in this case does not establish that any injury at all will result to Plaintiffs from the implementation of the Rail Act. In order to determine whether the value of Plaintiffs' claims will in fact be eroded—that is, whether Plaintiffs will, on balance, suffer economic injury—through the implementation of the Act, a court would have to make a comparison between Plaintiffs' present situation and the consequences of implementing the Act. Only if Plaintiffs have available to them some currently feasible course of action that would produce greater value for the estates than can be realized through reorganization pursuant to the Act will Plaintiffs be harmed by continued proceedings under the Act.[94]

Plaintiffs have not established a record that permits such a comparison to be made. It is not clear what feasible course of action the Penn Central (or any other) railroad estate would follow if it were permitted to proceed on the premise that the Rail Act did not exist, and it is wholly unclear what the dollar consequences

[94] The court below noted that Plaintiffs included secured creditors, unsecured creditors, and shareholders. That fact, however, does not eliminate the differences between classes or remove the necessity for a comparison between the consequences of Rail Act procedures and the consequences of some feasible alternative. Even if the value of the Penn Central estate is declining, it is quite possible that each and every class will be as well or better off under the Act as under a liquidation beginning now.

For example, the massive labor claims that would arise on liquidation would have priority over at least the stockholders. A comparison of the results of the Rail Act with the results of liquidation from the point of view of the stockholders would have to take into account these claims and the $250,000,000 in labor protection funds provided by the Act but unavailable in liquidation. On the other hand, in the absence of evidence, it is unknown whether more senior classes of claimants, whose claims may be amply covered, would be injured at all by a decline in values between now and the implementation of the Final System Plan.

Needless to say, the presence as Plaintiffs of persons in all classes does not itself establish that any class is being injured.

of any such course of action would be. On the other hand, it is obviously impossible to determine now the dollar consequences of reorganization pursuant to the Act.

Plaintiffs seek to suggest, and the court below apparently concluded, that the only facts of record—recent income-statement losses, together with the continuing increase in administration claims—demonstrate that some unspecified present alternative must necessarily be better than proceeding under the Rail Act. The only alternative that suggests itself is to begin liquidation of the Penn Central estate for non-rail purposes, with its attendant uncertainties, expenses, and delays. The facts of record fail wholly to support the court's apparent conclusion that such a course would yield greater value than reorganization under the Act, for several reasons: First, income-statement losses, computed in accordance with ICC accounting procedures and including as expense items (for example) track replacement costs that may even increase the value of the Penn Central estate[95] and depreciation, do not establish that the value of the assets is declining; second, even if liquidation value were demonstrably declining, the essential comparison is between the value of the Penn Central now, in liquidation, and the going-concern value of the Penn Central estate's share of a revitalized system that has received substantial federal support; and third, it is by no means clear that a liquidation commenced today or any other alternative action would stop the losses and solve the creditors' problems more quickly than proceedings under the Act.

There is a second and more fundamental point. The central premise of Plaintiffs' erosion argument is their contention that they have a constitutional right to terminate rail service and liquidate the Penn Central es te

[95] This accounting treatment was criticized as unrealistic in Coleman, *Is Railroad Accounting Off the Track?*, 130 J. Accountancy 64, 66-68 (Oct. 1970).

now. They contend that consequently they are entitled to a present assurance that they will ultimately receive the current liquidation value of the estate plus the amount of priority administration claims accruing between now and the time they receive that value. We believe that Plaintiffs' central premise is wrong as a matter of law. Plaintiffs do not have a right to liquidate or be compensated for not doing so. As we have repeatedly stressed, the Rail Act makes adequate provision for payment of whatever "constitutional minimum" Plaintiffs are ultimately adjudged entitled to receive. However, we reject Plaintiffs' views about the measure of that constitutional minimum.

Plaintiffs assert that their right to liquidate is established by three cases decided in the early 1920's holding that owners could not be compelled to continue to operate tiny, hopelessly unprofitable railroads when it was clear that there was no way of restoring them to profitability.[96] Since the enactment of Section 77, however, it has been clear (and has been established by repeated decisions of this Court) that if a railroad is important and reorganizable, the rights of its creditors and owners are inherently subject to the right of the public to keep it running while reasonably prompt efforts are made to reorganize it on a self-sustaining basis.

When this Court upheld the constitutionality of Section 77, it held that such a deferral of remedies was justified in view of Congress' determination that the "continuous, uninterrupted operation [of railroads] is

[96] *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), involved a narrow gauge railroad between Kentwood and Hackley, Louisiana, which was "primarily a logging road" but which the Court "assumed" to have done business as a common carrier. *Bullock* v. *Railroad Commission*, 254 U.S. 513 (1921), involved a "logging road" for which one suggested total purchase price was $200,000. *Railroad Commission* v. *Eastern Texas R.R.*, 264 U.S. 79 (1924), involved a railroad 30.3 miles long which had been built to carry timber, whose supply had been exhausted.

necessary in the public interest." *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648, 671 (1935). As the Court observed, "without the maintenance of the *status quo* for a reasonable length of time no satisfactory plan could be worked out." *Id.* at 679.[97] Consequently, the contention of Plaintiffs here that they have a right to be assured of full compensation for their cooperation with the effort to save Penn Central is without legal basis.

A. *Plaintiffs Have Not Shown that Any Erosion Will Occur*

This Court discussed the erosion issue in the *New Haven Inclusion Cases*, 399 U.S. 392, 489-93 (1970). The Court made clear that the essence of erosion is a net reduction in the amount available to satisfy pre-bankruptcy claimants. The Court stressed that there are two factors that may reduce the size of the "pot" available to pay pre-bankruptcy claims: a decline in the total value of the assets of the estate, and an accumulation of priority administration claims. Consistent with this Court's analysis in that case, other courts have pointed out that market appreciation in asset values during reorganization tends to increase the amount realized by pre-bankruptcy claimants, offsetting other factors, such as operating losses, which tend to reduce the realizable value. See *In re Boston & Maine Corp.*, 484 F.2d 369, 373 n.5 (1st Cir. 1973). In fact, in the Reading Railroad "180-day" proceedings, where the Court held in favor

[97] "[A] proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." *Id.* at 676.

of reorganization under the Rail Act,[99] the Reading Trustees presented evidence to show that the value of the estate would *increase* over time despite rail operating losses.

As we have previously noted, the court below recited the stipulated fact that the Penn Central income statements for the reorganization period show $851 million in losses, concluded that this made the erosion issue ripe for adjudication, but then failed actually to adjudicate it. It is worth reemphasizing that the record in this case is devoid of any direct evidence about the value of the Penn Central estate on *any* basis (except book)[99] at any time, past, present or future. The ability of the estate today to pay the creditors' claims by liquidating its assets, the amount that would be left over for shareholders, and how these items would change if liquidation began a year hence instead of today, are all matters on which the record is grossly deficient.

In failing to inquire into these matters, the court below seems to have assumed that the income-statement losses are necessarily producing a net reduction in the ability of the Penn Central estate to pay its debts (whatever that ability may now be). Income statements, however, do not necessarily show even that. For one thing, as noted above, they leave out of account changes in asset values, which are essential to any comparison of

[99] *In the Matter of Reading Co.*, Bky. No. 71-828 (E.D. Pa., July 1, 1974), *appeal pending*, No. 74-7 (Spec. Ct. R.R.R.A., filed Aug. 20, 1974).

[99] The court below recited a book value of $4,419,917,759 for Penn Central's assets at the end of 1971, and total (unadjudicated) claims, both secured and unsecured, of $3,348,620,840, on which the Trustees had estimated an actual liabiilty of $1,583,076,820. JA 9 at 38.

liquidation values at different times.[100] For another, they reflect items having no direct relation to value.

For example, the $851 million in income-statement losses of Penn Central reflect "expenses" of $313 million in depreciation; $358 million in track replacement required by the ICC to be charged to current income; $100 million in deferred leased-line rentals; and $250 million in deferred interest on debt. Depreciation, however, is an arbitrary charge not involving the expenditure of cash and not necessarily reflecting any decline in recoverable value. Track replacement, while an "expense" according to ICC conventions, presumably does not reduce liquidation value and may actually increase it. It is stipulated that Penn Central's actual liability on leased-line rentals is unknown.[101] Finally, less than half of the deferred interest is on debt that purports to be secured, and unsecured debt is not entitled to receive post-bankruptcy interest as an allowable claim in re-

[100] For example, the trade publication Iron Age indicates that the market value of heavy melting scrap (such as scrapped steel rails) has dramatically increased since June 21, 1970:

MARKET PRICES FOR NO. 1 HEAVY MELTING SCRAP AT SELECTED LOCATIONS ($/TON)

	Prices On June 22, 1970*	Prices On July 15, 1974**
Chicago	$43-44	$137-138
Pitsburgh	42-43	129-130
Philadelphia	43-44	118-120

* Iron Age, June 25, 1970, at 94.
** Iron Age, July 22, 1974, at 64.

[101] Stipulation of Facts, ¶ 13 (JA 203 at 208). The point is that the figure charged to Penn Central's income is the total stated lease obligations, but if any leases are disaffirmed, the Trustees will have an offset in the amount of any losses incurred for the account of the lessor. See Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C. § 205(c)(6).

organization.[102] These four items alone thus raise more than $1 billion worth of doubt about the impact of an $851 million loss.

Moreover, even if creditors were entitled to receive present liquidation value, the comparison necessary to determine whether they will be injured by actions taken under the Rail Act would not be between liquidation values now and in the future but between liquidation value now and the going concern value of the Penn Central estate's share of the reorganized rail system, represented by Conrail securities and USRA obligations, plus other benefits provided by the Rail Act and the value of all assets not transferred under the Act. It is hardly necessary to point out that the record here does not permit even a guess at the results of such a comparison.

B. *Railroad Creditors and Shareholders Do Not Have a Constitutional Right To Be Held Harmless from Erosion During the Period Reasonably Necessary To Reorganize and Save the Railroad*

Plaintiffs have contended, and the court below may have assumed, that the claimants against the Penn Central estate are constitutionally entitled to receive at least the present liquidation value of the estate's assets. Therefore, they reason, any erosion caused by implementation of the Rail Act entitles Plaintiffs to compensation. That reasoning is based on the premise that the *Brooks-Scanlon* line of cases, *supra*, gives railroad investors a constitutional right to cease operations and realize net liquidation value if the railroad has no reasonable prospect of future profitability. Since the Penn Central cannot be separately reorganized on an income basis, Plain-

[102] *In re New York, N.H. & H.R.R.*, 304 F.Supp. 1121, 1129-34 (D. Conn. 1969). *Cf.* 3A Collier on Bankruptcy ¶ 63.16, at 1858 (14th ed. rev. J. Moore); 5 *id.* ¶ 77.20, at 562-63 n.6.

tiffs characterize it as "hopelessly losing" within the meaning of *Brooks-Scanlon* and invoke the protection of that decision.

We submit that *Brooks-Scanlon* has no applicability to the situation of the Penn Central or the other estates subject to the Rail Act. The *Brooks-Scanlon* line of cases was premised on the absence of any means, internal or external, of continuing rail operations on a self-sustaining basis. Since those cases were decided, this Court has confirmed beyond doubt that investors who have dedicated their property to railroad use in the public interest have no right to withdraw that dedication as long as a reasonable prospect exists that the railroad's operations can be made self-sustaining. Whether the prospect of future profitability arises internally—as in a traditional Section 77 reorganization—or externally—as in the case of the Rail Act—it justifies requiring continued rail operations without compensation for a period reasonably necessary to complete efforts to save the railroad's operations.

To subject railroad investors to some economic burden in such circumstances does not involve a deprivation of their "property" rights.[103] It involves merely a recogni-

[103] It is far too late in our constitutional history to suggest that any governmental action that impairs property rights or reduces property values creates a right in the owner to compensation. Federal, state, and local governments daily undertake myriad actions that affect the use or value of private property.

"It goes without saying that the courts have never construed the 'just compensation' clause of a federal or state constitution as requiring payment for all injuries imposed upon persons or property by acts of government. Any such requirement would make government itself impossible. No legislature can enact an important statute which does not directly or indirectly impose a material loss on some property owners." L. Orgel, Valuation Under the Law of Eminent Domain § 1, at 5 (2d ed. 1953).

See, *e.g.*, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (zoning ordinance preventing continuation of an existing commercial use of real property did not constitute a taking); *Jackson* v. *United*

tion that the property rights of railroad investors are inherently subject to the public's right to make reasonable efforts to save the common carrier rail operations to which the owners dedicated their properties. So long as reasonable efforts are being made to preserve an important rail transportation system, the rights of creditors command neither "Procrustean measures" [104] nor compensation for failure to take them.

1. *The Earliest Decisions Under Section 77 Established that Some Erosion Is Permissible Pending Reorganization*

In contending that they have a constitutional right to be compensated for any erosion of their interests during the period necessary to reorganize their railroad, Plaintiffs seek to overturn an unbroken line of Supreme Court decisions under Section 77. The question whether claimants against a debtor railroad may constitutionally be required, without compensation, to suffer a decline in their positions during the period reasonably needed to reorganize the railroad was answered when Section 77 first reached this Court in the *Rock Island* case.[105] In that case, holders of "collateral notes" issued by the debtor challenged an order of the reorganization court which barred them from foreclosing on their collateral. The Court responded as follows:

States, 230 U.S. 1 (1913) (flood control improvements which injured private property by overflow or erosion did not constitute a taking); *Gibson* v. *United States*, 166 U.S. 269 (1897) (Government actions to improve navigation which impaired riparian rights of waterfront owner did not constitute a taking); *Steel Hill Development, Inc.* v. *Sanborton*, 469 F.2d 956 (1st Cir. 1972) (three-acre and six-acre minimum lot requirements imposed to preserve environmental values did not constitute a taking).

[104] *Penn-Central Merger Cases*, 389 U.S. 486, 511 (1968).

[105] *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935).

> "It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. . . . A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; *but it presents a question addressed not to the power of the court but to its discretion*—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised." 294 U.S. at 677 (emphasis added).[106]

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[106] It has sometimes been suggested that the *Rock Island* case can be distinguished on the ground that the holders of the collateral notes had ample security. *E.g.*, Note, *Takings and the Public Interest in Railroad Reorganization*, 82 Yale L.J. 1004, 1112 (1973). See also *In re Penn Central Transp. Co.*, 494 F.2d 270 (3d Cir.), petition for cert. filed, 42 U.S.L.W. 3633 (U.S. May 8, 1974) (No. 73-1672) ("*Columbus Option Appeals*").

The purported distinction evidences a clear misreading of the *Rock Island* opinion. The notes involved were secured by mortgage bonds of the debtor and its affiliates, which were in turn secured by rail properties. It is true that the face amount of the mortgage bonds exceeded the face amount of the collateral notes and that the debtor alleged that the value of the bonds exceeded the face amount of the notes. However, no court either found, assumed, or even inquired whether the notes were in fact adequately secured.

This Court did note that the face amount of the bonds exceeded the face amount of the notes, but for an entirely different reason and in a separate part of its opinion. In foreclosure of the notes the trustees for the noteholders would have sold the bonds securing the notes, thus rendering the bonds outstanding against the debtor, and "the capitalization outstanding in the hands of the public would to that extent be expanded." 294 U.S. at 661. Thus it was necessary to restrain foreclosure of the notes in order to facilitate the development of a reorganization plan. See *id.* at 678. While the Court never did discuss the value of the mortgage bonds, it may be presumed to have been aware that the face amount of bonds of a railroad in reorganization is not indicative of the value of the bonds.

It is clear from the opinion that the statement quoted in the text was not based in any way on the assumption that the creditors

The extent to which creditors' interests may constitutionally be eroded during the reorganization of a salvageable railroad was vividly demonstrated a decade later in *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R.*, 328 U.S. 495 (1946). In that case the Court upheld a plan of reorganization over the objections of secured creditors whose claims had lost 90 percent of their value during the ten years required for adoption of the plan. When the railroad had filed its petition under Section 77, its properties had been worth more than enough to pay all pre-bankruptcy debts. During the ten intervening years the railroad had produced some income, but the income was used for improvements [107] rather than to pay interest on the bonds. The unpaid interest on senior debts accumulated to the point that, when the process was completed, the value remaining for the junior class of bondholders was only 10 percent of their claims.[108] Although about 80 percent of the junior bondholders voted to reject the plan, the reorganization court confirmed it under the "cramdown provision" of Section 77(e). Affirming that action, the Supreme Court said that railroad creditors

> "cannot be called upon to sacrifice their property so that a depression-proof railroad system might be created. But they invested their capital in a public utility that does owe an obligation to the public. . . . [B]y their entry into a railroad enterprise, [they] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs." *Id.* at 535-36.

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were fully protected; on the contrary, the Court held that the secured creditors could be forced to take their chances if necessary to permit the reorganization to carry on.

[107] Sequestration of this income was refused in favor of making improvements. *Van Schaick* v. *McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941).

[108] 328 U.S. at 537-39, 542-45 (Frankfurter, J., dissenting).

2. *This Court Reviewed and Reconfirmed this Rule in the New Haven Litigation*

More recently, in the *New Haven* litigation, the courts again confirmed that creditors can be forced to accept a substantial and uncompensated erosion loss because of the public interest in finding a way to keep the railroad running. Every court that considered this question in the *New Haven* context held that such a burden was permissible if necessary to provide a reasonable time to find and implement a means of preserving the New Haven's operations.

To appreciate the importance of the *New Haven* litigation to the questions presented here, it is necessary to review the history of that case in some detail. The New Haven entered reorganization on July 7, 1961. It was suffering continual operating losses and cash outflows. By late 1963, it was clear that the railroad was in a hopelessly losing posture and that the only possibility for salvaging its operations was inclusion in the then proposed merger of the Pennsylvania and New York Central railroads.[109] Negotiations between the New Haven Trustees and the two larger railroads, encouraged by the ICC and the reorganization court, led to an agreement that the New Haven assets would be included in the Penn Central merger and that the New Haven estate would be paid the liquidation value of its assets of December 31, 1966. The merger was consummated in January 1968 and the inclusion of the New Haven took place on December 31, 1968.

The New Haven reorganization court noted in 1969 that six years earlier, in 1963, there had been two choices, either pursuing the possibility of inclusion or undertaking immediate liquidation; that the former course

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[109] See *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451, 456-57 (D. Conn. 1968).

had been chosen; and that " 'losses as are reasonably incident to working out the solution most consistent with the public interest' eroded the debtor's estate in excess of $60 million." [110] This erosion can be divided into two categories. First, there was a decline in the net worth of the New Haven estate between 1961 and December 31, 1966, the date on which the assets were valued for purposes of inclusion. Second, and more important, there was a logically certain diminution of the recoveries of pre-bankruptcy creditors because of the accumulation of priority claims between the December 31, 1966 valuation date (as of which the total compensation became fixed) and the inclusion two years later. Full compensation was not awarded for either category of losses, even though the equity, the unsecured creditors' claims, and some secured creditors' claims had become worthless by the time of inclusion.[111] In particular, although the Penn Central was required to assume part of the continuing burden after 1966, the formula used made it clear that this would cover only a fraction of the erosion loss.

Each of the series of decisions dealing with this erosion problem recognized and upheld the imposition of an economic burden on the New Haven creditors. In *Penn-Central Merger Cases, supra*, the Supreme Court rejected the argument of some New Haven bondholders that, "because continued operation of the New Haven at a loss involves progressive erosion of the bondholders' security," immediate inclusion of the New Haven in the

[110] *In re New York, N.H. & H.R.R.*, 304 F.Supp. 793, 800 (D. Conn. 1969), quoting *New York, N.H. & H.R.R. Bondholders* v. *United States*, 289 F.Supp. 418, 444 (S.D.N.Y. 1968).

[111] See *New Haven Inclusion Cases, supra*, 399 U.S. at 490 n.82; *New York, N.H. & H.R.R. Bondholders* v. *United States, supra*, 289 F.Supp. at 442 n.18; *cf. In re New York, N.H. & H.R.R.*, 378 F.2d 635, 640 (2d Cir. 1967).

merged Penn Central was required. 389 U.S. at 509. In rejecting this argument the Court held:

> "Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of the Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders whose interests may or may not be served by the destructive move." *Id.* at 510-11.

The bondholders subsequently renewed earlier efforts to obtain dismissal of the New Haven reorganization. The New Haven reorganization court denied their request, noting that

> "[t]he claims of the bondholders and their fears for the diminishing value of the New Haven's assets through continued deficit operations was [sic] expressly noted and considered [by the Supreme Court in the *Penn-Central Merger Cases*]." *In re New York, N.H. & H.R.R.*, 281 F. Supp. 65, 68 (D. Conn. 1968).

The court further declared that:

> "To jettison everything achieved and turn back just as a glimmer of light begins to show at the end of a

long dark tunnel not only carries with it an aura of unreality but borders on the fantastic." *Id.*

The predicament of the New Haven bondholders at that time was far more compelling than the present situation of the Penn Central creditors.[112] The New Haven had been in reorganization for seven years, suffering continuous losses. The equity and unsecured debt had become worthless. For more than four years, it had been clear that the railroad could not be made viable without external assistance. The only solution, inclusion in the Penn Central, was still some time away and was beyond the control of the reorganization court. Although the exact amount of compensation to be paid to the New Haven had not been calculated, the upper limit had been fixed in principle, at least by the ICC, at net liquidation value on December 31, 1966, a basic limit the reorganization court and the Supreme Court were later to accept. Against this fixed total of compensation to the estate, the accumulation of additional administration claims, reducing the eventual recovery by secured creditors, was clear and certain. When the reorganization court rejected the petition to dismiss as "unreal" and bordering on the "fantastic," it did so in the face of certainty that a further economic burden would be imposed on secured creditors.

The New Haven reorganization court did, of course, conclude on August 13, 1968—seven years after the New Haven filed under Section 77—that the reorganization could not continue after the end of that year unless inclusion took place. 289 F.Supp. at 459. Even so, the court clearly recognized that the question was one of *balancing* the interests of creditors against the public interest, and it struck the balance in favor of the creditors

[112] The record in this case would not support a finding that the net liquidation value of the Penn Central estate will be insufficient to cover the claims of the secured creditors. See pp. 75-82 *supra*.

only when no significant public interest in further delay was perceivable. The decision was made in four steps:

First, the court noted that it "was clear that the liquidation value of the New Haven . . . was being chiseled down day after day by the operating losses . . . ." *Id.* at 457.

Second, the court described the constitutional rights of bondholders as follows:

> "Both the Commission and the courts, however, have reiterated in this and in related proceedings that as bondholders of a railroad their interests are subject to such invasion as may be essential to continue the operation of the railroad for a reasonable period of time to provide an opportunity to work out a permanent plan or means of continuing the operation, if possible, to the extent that it is required by the public interest." *Id.* at 455.
>
> "As investors in railroad bonds, the petitioners were required in the public interest to suffer the burden of keeping the Railroad operational for a reasonable period to permit this [inclusion] to be accomplished." *Id.* at 457.

Third, the court recognized that the total amount to be paid to the New Haven estate had been fixed in principle (although not yet calculated in detail), that the question was therefore how much of this fixed amount could be used up in the public interest at the expense of the bondholders, and that this was essentially a question of balancing:

> "The extent to which the constitutional minimum of value of property rights to which the bondholders are entitled (in this case the liquidation value as of December 31, 1966) may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with

mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public if service were terminated, the rate of losses and the feasibility of possible solutions." *Id.* at 459.

Fourth, the court recognized that there was no longer any significant public interest to be taken into account because there was no reason why inclusion could not take place immediately:

> "There is presently no reason why the Penn-Central should not take over the New Haven at the beginning of 1969. The record of the merger and inclusion cases make it abundantly clear that the inclusion of the New Haven was an absolute and unequivocal condition of the approval of the merger of the Pennsylvania and New York Central Railroads, from the order of the Commision through the decision of the Supreme Court." *Id.* at 460.

This decision of the New Haven reorganization court was never appealed.[113]

This Court, when it ultimately reviewed the New Haven plan of reorganization, confirmed this view. *New Haven Inclusion Cases, supra*, 399 U.S. at 490-93. The Court said it had no doubt that the time elapsed in the proceedings "has imposed a substantial loss upon the bondholders."[114] *Id.* at 491. However, the Court stated that

[113] A three-judge district court, reviewing the terms of New Haven's inclusion in the Penn Central merger, made the same point:

> "Although we agree that by investing in a railroad the bondholders did not surrender their constitutional right not to be required to operate the property at a perpetual loss, they did subject themselves to such interim losses as are reasonably incident to working out the solution most consistent with the public interest." *New York, N.H. & H.R.R. Bondholders* v. *United States, supra*, 289 F. Supp. at 444.

[114] The Court noted the ICC's finding that the debtor's estate had amassed more than $70 million in administrative and pre-

this presented a question addressed to the discretion of the reorganization court, citing *Rock Island*, and it repeated its earlier statement in *Denver & Rio Grande* that

> "'[b]y their entry into a railroad enterprise, [the bondholders] assumed the risk that in any depression or any reorganization the interests of the public would be considered as well as theirs.'"[115]

The Court did note that "the failure of the bondholders to press for early liquidation of the New Haven meant that their initial application for a dismissal of the reorganization proceedings came just as the objective of salvaging the New Haven appeared possible to achieve." *Id.* at 493. That comment cannot be read to suggest that the bondholders lost some constitutional rights by sitting on them. The Court's opinion makes it perfectly clear that the bondholders were seeking compensation for losses incurred in several periods, including the period after they filed their dismissal petition, and that all of their claims were rejected on the merits—on the ground that their property rights were inherently limited by the public right to make reasonable efforts to keep the railroad operating.[116]

bankruptcy claims between 1961 and 1968. *Id.* at 490. It did not specifically review the accuracy of that figure.

[115] *Id.* at 492, quoting *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.R.R., supra*, 328 U.S. at 536.

[116] This interpretation of the decisions from *Rock Island* through *New Haven Inclusion Cases* was adopted in *In re Boston & Maine Corp.*, 484 F.2d 369, 374-75 (1st Cir. 1973), where the First Circuit rejected the argument of creditors of the Boston & Maine Railroad that its reorganization proceeding should be dismissed because the continuation was eroding the estate.

3. *External, as Well as Internal, Sources of Aid Must Be Considered in Assessing the Penn Central's Future Prospects*

The court below may have implicitly assumed that any possible means of saving a railroad which are beyond the direct control of the Reorganization Court, the ICC, or the trustees need not be considered in determining whether the condition of the railroad is so hopeless that there is a right to liquidate. However, there is no reason to wear blinders of that sort in applying the Fifth Amendment. No court decision has given railroad investors a constitutional right to have the condition of their railroad evaluated without reference to external sources of help. In fact, the *New Haven* litigation puts to rest any doubt that external help, when available, must be taken into account.

The one fact that was never questioned in the *New Haven* litigation was that the New Haven Railroad, taken by itself, was a "hopelessly losing" venture in the *Brooks-Scanlon* sense. Although this became clear "[b]y about 1963," [117] the New Haven was kept operating, through six more years of continuing losses, because the possibility of including it in a merged Penn Central system offered a way of saving it as a going concern.[118] Yet the reorganization court never had the power to order inclusion. The only possibility of saving the New Haven's operations hinged on a number of external factors beyond the reorganization court's control.

Inclusion of the New Haven in the merged Penn Central was ultimately dependent on the ability of the Pennsylvania and New York Central Railroads to merge, on their willingness to merge on the conditions set by the

[117] *In re New York, N.H. & H.R.R.*, 289 F.Supp. 451, 456 (D. Conn. 1968).

[118] See, *e.g.*, *In re New York, N.H. & H.R.R.*, 304 F.Supp. 1121, 1133-34 (D. Conn. 1969).

ICC,[119] and on actions of the ICC which the reorganization court had no power to direct. Nowhere in the *New Haven* litigation was it suggested that the bondholders' rights under the Fifth Amendment should be measured *without regard* to the inclusion possibility. The history of that litigation shows clearly that investors' rights to compensation are not triggered merely because the railroad is in a "hopelessly losing" posture without reference to external help.

4. *The Public Interest in Implementing the Act Clearly Outweighs Any Foreseeable Burden on Investors*

To determine whether the burden that may be imposed on creditors under the Rail Act is reasonable requires a balancing process similar to that performed in the *New Haven* litigation. We believe that, when the public interest in preserving Northeast rail operations [120] is balanced against any burden on investors, it is clear that Plaintiffs' effort to have the proceedings under the Act abandoned at the outset "borders on the fantastic."

In measuring the public's side of the balance, it is appropriate for this Court to take into account "the seriousness of adverse consequences to the public if service were terminated . . . and the feasibility of possible solutions." [121] The Act embodies Congress' judgment on these matters, a judgment entitled to substantial defer-

[119] The ICC had the power to impose conditions on the merger, but it had no statutory power to compel a merger. *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 305-06 (1954).

[120] For a discussion of the elements of that public interest and an exposition of the strenuous attempt of Congress to protect it, see Introduction.

[121] *In re New York, N.H. & H.R.R., supra*, 289 F.Supp. at 459 (D. Conn. 1968).

ence.[120] The public importance of maintaining these massive rail operations is substantially greater than the public interest present in the *New Haven* case. The ultimate success of the proposed solution—reorganization under the Act—obviously cannot finally be determined at this time. It cannot be presumed, however, that the procedure carefully designed by Congress will not work. Even in the case of Penn Central it is clear, in view of the complexity of the problem, the inability of the Trustees to determine until 1973 that a conventional reorganization was not feasible without government assistance and the speed and scope of Congress' response, that the public's right to insist on continuous efforts to save rail operations has not been exhausted.

Turning to the other side of the balance, the record entirely fails to establish that proceedings under the Act will impose an economic burden on the creditors and owners. It is altogether possible that reorganization under the Act will permit a greater recovery by the claimants than any other feasible alternative, and it is not clear that continuation of any of these reorganization proceedings is now imposing any net burden. By contrast, in the *New Haven* case, it was clear after December 31, 1966 that creditors' recoveries must diminish as the reorganization continued, because liquidation value on that date set a limit to the compensation to be paid to the estate. The record here wholly fails to establish that continuation in reorganization for another 12 months will increase rather than decrease the burden of the situation in which the investors now find themselves.

At bottom, the alleged constitutional right to be compensated for erosion depends on the right to liquidate at

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[120] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609-10 (Frankfurter, J., concurring); *United States* v. *Darby*, 312 U.S. 100, 115-17 (1941); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400 (1937).

will. The only authority for that right is the *Brooks-Scanlon* line of cases, *supra*. The distinction is that *Brooks-Scanlon* does not give owners and creditors a right to liquidate a railroad that is profitable, or that can be made self-sustaining and profitable by a bankruptcy reorganization, merely because the owners and creditors want to transfer their investment into a different and more profitable enterprise. This Court's decisions under Section 77 establish that, if future profitability is reasonably possible, then creditors can be required to suffer erosion during a reasonable reorganization period and ultimately to accept going-concern value. Any other result would place the nation's need for rail service at the whim of owners and creditors. The *Brooks-Scanlon* line of cases, which involved railroads that there was no discernible public interest in saving[121] and in which the impossibility of salvage was assumed at the outset, is not to the contrary.

Because the Rail Act is available, the position of the Penn Central is far from hopeless. To paraphrase Judge Anderson's metaphor, more than a "glimmer of light" is "beginning to show," and the tunnel is not as "long" or as "dark" as it was in the case of the New Haven. Under the balancing test applied in the *New Haven* litigation, the public interest clearly justifies exposing the claimants to some possible economic burden while the process of the Act is allowed to work.

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[121] The closest thing to a mention of the public interest is the hypothetical statement in *Brooks-Scanlon* that "[i]f the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." 251 U.S. at 399. In the context of a logging railroad that the Court merely "assumed" to have done business for third persons as a common carrier, *id.* at 398, this remark adds nothing to the bare holding that an unsalvageable railroad may be abandoned.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed (except as to paragraph 3 of the District Court's order and so much of the paragraph as denies in part Plaintiffs' motions for summary judgment).

Respectfully submitted,

LLOYD N. CUTLER

WILLIAM R. PERLIK

LOUIS R. COHEN

Attorneys for the United States Railway Association

Of Counsel:

BARRY E. CARTER
PAUL C. HUDSON
WILLIAM T. LAKE
J. B. STEPHENS
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

JORDAN JAY HILLMAN
Senior Legal Consultant
United States Railway Association
2100 Second Street, S.W.
Washington, D.C. 20590

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